TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[redacted]

No. [redacted] 56

TOWN OF [redacted], APPELLANT,

vs.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 10, 1914.

(24,031)

(24,021)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 340.

TOWN OF ESSEX, APPELLANT,

vs.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 *Transcript of Record of District Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, Begun and Holden at Boston, within and for the District of Massachusetts, on the Second Tuesday of September, Being the Ninth Day of September, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Before the Honorable James M. Morton, Jr., District Judge

No. 32, Equity Docket.

(No. 198, C. C.)

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, Complainant,
v.
TOWN OF ESSEX, Defendant.

The Bill of Complaint in this cause was filed in the clerk's office on the thirty-first day of July, A. D. 1905, and was duly entered at the February Term of the Circuit Court, A. D. 1905, and is in the words and figures following:

Bill of Complaint.

(Filed July 31, 1905.)

To the Honorable the Justices of the Circuit Court of the United States for the District of Massachusetts:

The New England Telegraph Company of Massachusetts, a citizen of the Commonwealth of Massachusetts, brings this its bill of complaint against the Town of Essex, a citizen of the Commonwealth of Massachusetts, and thereupon your orator complains and says:

2 I. That your orator is a corporation duly organized and existing under and in accordance with the laws of the Commonwealth of Massachusetts and is a citizen of said State and a resident therein, and is an integral part of the system of the Postal Telegraph-Cable Company.

II. That the Town of Essex is a citizen of the Commonwealth of Massachusetts and a resident therein.

III. That your orator is a telegraph company authorized by its charter to maintain and operate lines of telegraph in and between various states of the United States, including the State of Massa-

chusetts, and is actually engaged at the present time in maintaining and operating lines of telegraph running in and through various states of the Union and is engaged in interstate commerce by reason of the transmission of messages by it over its lines between the different states and throughout the United States, including the State of Massachusetts, constituting a comprehensive system by which telegraph messages are sent not only thereon throughout the United States, but to and from all parts of the civilized world. And your orator maintains many offices throughout the United States for receiving and transmitting messages for each and every of which intercommunication is had with each and every other office of the United States including each and every other office maintained by your orator in the State of Massachusetts, of which there are many in the various parts of the said State; and that your orator transmits messages from and to the Government of the United States at the City of Washington and in all the principal cities and municipalities and towns where your orator maintains its offices; and that said lines of telegraph within the State of Massachusetts are an indivisible portion of the said entire system of telegraph lines so maintained and operated as aforesaid; and that the matter in dispute in this suit largely exceeds, exclusive of interests and costs, the sum or value of two thousand dollars ($2,000); and that, as hereafter more fully set forth, it arises under the constitution and laws of the United States; and that your orator being authorized so to do, prior to the construction of the line of tele-
3 graph hereinafter referred to, duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of the United States entitled "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and Others Purposes," approved July 24, 1866, and the amendments thereto; and that your orator has fully complied with the provisions of said Act of Congress in that your orator has transmitted to and from the Government of the United States telegraph messages at rates fixed by the Postmaster General of the Government of the United States, and that your orator has fully complied in all other respects with said acts of Congress and the obligations thereof. That said Act of Congress of 1866 authorizes your orator by reason of said acceptance to construct, maintain and operate its lines of telegraph over and along any of the post roads of the United States, and that by the Act of Congress of March 1st, 1884, all public roads and highways kept up and maintained as such are declared to be post roads: and your orator further alleges that the highways passing in and through said Town of Essex and upon which your orator desires to construct its lines of telegraph have been and now are public highways kept up and maintained as such, and are post roads within the meaning of the acts of Congress as aforesaid.

IV. That in the year 1884 your orator constructed a line of telegraph from the City of New York in the State of New York to the Transatlantic cable station in the Town of Rockport in the Commonwealth of Massachusetts; that the Town of Rockport can and

could only be reached by constructing a line either through the Town of Essex or the Town of Manchester; that the direct route is through the Town of Essex, and to construct a line through the Town of Manchester would involve an extremely circuitous route and would entail great and heavy expenditures of money and would be an extreme hardship upon your orator; that, accordingly, your orator in the year aforesaid constructed its line of telegraph through the town of Hamilton which borders Essex on the west to a point on the easterly boundary of said Hamilton which was fixed by the action of said Town; that the point in the westerly boundary of the City of Gloucester which borders Essex on the east, where
4 your orator's line touches said boundary, was fixed by the action of said city; that between the points so as aforesaid fixed by the Town of Hamilton and the city of Gloucester there are absolutely no other roads or highways whatsoever that can be used as a route for your orator's line than those no- occupied by it, to-wit: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line; that your orator constructed its line as aforesaid through the town of Essex with the consent and permission of its selectmen and it has remained substantially as so constructed down to the time of the filing of this bill; that said highways are of sufficient width to allow of the construction and operation of your orator's line of telegraph without inconvenience to the public as is evidenced by the fact that the said line has been in existence there for more than twenty years.

V. That at the present time and for a considerable period prior hereto certain of the poles in your orator's line of telegraph in said Town of Essex are and have been old and rotten, and certain of the wires inoperative, and the telegraph line of your orator in said town is in places in an unsafe condition and dangerous to the public and liable at any time to become wholly inefficient for the purposes of your orator's business; that since your orator's line was constructed in said town many trees have been planted and new driveways have been made and buildings erected, and the poles have been carried up to an unusual height to clear the trees in said highways, and for these and other reasons the line of your orator's telegraph in said Town of Essex needs re-locating on said highways in which it now exists, for the benefit of the abutters and the town, and to meet the present conditions of your orator's business. That, therefore, on June 1st, 1905, your orator for the purpose of relocating its line of telegraph in the Town of Essex on the highways aforesaid filed a petition in writing with the board of selectmen of the Town of Essex, a copy of which petition is hereto annexed, marked "A," and it is prayed that the same may be taken as a part hereof; that in said petition your orator prayed for a location for its poles and wires and license to maintain the same in the following named streets and highways of said town, viz., from the town line of Hamilton
5 through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions now occupied by the old poles and any changes in the present location to be made under the direction of the board of

selectment; that on July 10, 1905, the board of selectmen of the Town of Essex at a meeting thereof voted not to grant the New England Telegraph Company of Massachusetts any locations for its poles and wires in the town and notified your orator to that effect by a letter, a copy of which is hereto annexed marked "B," and it is prayed that the same may be taken as a part hereof; that on the same day that your orator received this notification the selectmen of the said town orally declared to your orator that it was the intention of the town to prevent your orator from maintaining or operating any line of telegraph whatsoever within the limits of said town and threatened if your orator attempted to re-locate any of its poles in said highways to prevent your orator from so doing; that, thereupon, your orator was obliged by reason thereof and by force to stop said re-location and did so stop said re-location and by reason thereof your orator has been and still is unable to re-locate its said line of telegraph, or any portion thereof, on said highways in and through said town; that, thereupon, your orator attempted, without any re-location, in order to put its said line in said town into a safe and efficient condition, to re-set certain of its poles, substituting sound poles for rotten poles, in the same places occupied by the old poles, and to re-string its wires on said line, and to do other repairs necessary to put the said line into a safe and efficient condition, but, nevertheless, the selectmen of the town of Essex peremptorily forbade your orator from re-setting its poles, from substituting sound for rotten poles, or from restringing its wires, or making any repairs whatsoever of any name, nature or description, and threatened to take steps to prevent your orator from so doing if it continued in said attempt; that, thereupon, your orator was obliged by reason thereof and by force to stop all repairs and re-setting and re-stringing and did so stop all repairs and re-setting and re-stringing, and by reason thereof your orator has been and still is unable to repair its line or re-set its poles or re-string its wires in said town; that your
6 orator's line of telegraph in the said town of Essex is in a precarious condition, that there is extreme peril to life and limb and imminent danger of there being a break and interruption in its line of telegraph running so as aforesaid from the city of New York to said cable station in the town of Rockport; that your orator's line within the limits of the Town of Essex forms an important link in the interstate and international telegraph system maintained and operated by your orator; that from the aforesaid cable station in Rockport is the shortest route to various European places of great importance, particularly Russia; that the integrity of your orator's line is of great importance in view of the approaching Russian-Japanese Conference; that a new cable is now being laid — western terminus of which is to be the aforesaid cable station at Rockport; that in view of all this an interruption or break in said system in the Town of Essex would cause great damage to your orator and might be attended with serious results to many people in the United States and embarrass the Government of the United States itself.

VI. That the statutes of the Commonwealth of Massachusetts do

not permit a town in said State to refuse to allow a telegraph company to make changes, repairs and re-setting in its line necessary to keep said line in a state of efficiency and safety, nor to refuse absolutely to allow a telegraph company to re-locate its line; or to refuse such company any location whatsoever.

VII. And your orator alleges that all of said acts of the defendant so done and threatened as aforesaid, and which defendant will do unless restrained by order of this Honorable Court as your orator verily believes, are contrary to equity and good conscience and tend to manifest wrong and oppression of your orator in the premises.

In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the common law, and shall have only relief in a court of equity where matters of this kind are cognizable and relievable.

Wherefore your orator prays that the said defendant, its officers, agents and employees, each and all, be enjoined and restrained from interfering in any manner whatsoever with the re-location by your orator on the roads and highways now occupied by its said
7 line of telegraph in said town or with the re-setting of the poles of said line in said town by your orator, or with your orator's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency or from in any manner causing or allowing any other person or corporation to interfere with or stop such re-location, re-setting, repairs or changes by your orator; and that your orator may have such other or further relief, or both, in the premises as the nature of the case shall require and to your Honors seem meet and agreeable to equity and good conscience.

May it please your Honors to grant to your orator both the writ or writs of injunction and temporary injunction issuing out of and under the seal of this Honorable Court to be directed to the defendant, and its officers, employees and agents, and all other persons, to restrain them as in your orator's prayer for relief above set forth; and also that the writ of subpœna of the United States of America be directed to the said defendant, the Town of Essex, demanding the said defendant, at a certain day and under certain pain therein to be specified personally to be and appear before your Honors in this Honorable Court and then and there to answer all and singular the premises and to stand to, perform and abide such order and decree therein as to your Honors shall seem meet and agreeable to equity and good conscience, but answer under oath is hereby expressly waived by your orator; and your orator will ever pray.

By Its Attorneys, CARVER & BLODGETT.

G. PHILIP WARDER,
Solicitor and of Counsel.

8 "A."

The New England Telegraph Company, of New York, respectfully petitions the Honorable Board of Selectmen, of the Town of

Essex, Mass., for a location for its poles and wires, and license to maintain the same, in the following-named streets and highways of said town, viz:

From the town line of Hamilton, through Western Avenue, Maine Street, and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions now occupied by the old poles, and any changes in the present locations to be made under the direction of your Honorable Board.

NEW ENGLAND TELEGRAPH COMPANY OF NEW YORK,
By EDWARD B. PILLSBURY,
Superintendent.

Dated, Essex, Mass., June 1, 1905.

The above petition is granted.

____ ____,
____ ____,
____ ____,
Selectmen of Essex, Mass.

Dated, Essex, Mass., June —, 1905.

"B."

Office of Selectmen.

ESSEX, MASS., Jul- 11, 1905.

New England Telegraph Co., #84 State St., Boston, Mass.:

At a meeting of the board of selectmen of Essex held July 10th, 1905, it was voted not to grant the New England Telegraph Co. a location for its poles and wires in this town.

AARON COGSWELL, *Chairman.*

At the same term, to wit, July 31, 1905, a Motion for Temporary Injunction was filed by complainant.

9 Also at the same term, the following Motion to Amend Bill of Complaint and was filed and assented to:

Motion to Amend Bill of Complaint.

(Filed August 3, 1905.)

And now comes the complainant in said cause and moves to amend his bill by inserting in the prayer for relief in the fourth line thereof (35th line of page 6 of this Transcript of Record) after the word "whatsoever" and before the word "with," the words—"with your orator's line of telegraph in said Town of Essex or"; and by in-

serting after said word "with" and before the word "the," the words—"the location or".

By Its Attorneys, CARVER & BLODGETT.

Allowance assented to:

WM. B. SULLIVAN,
F. C. RICHARDSON,
Att'ys for Def't.

Also at the same term, to wit, September 5, 1905, the Motion for Temporary Injunction was allowed by the Court, and the following Order was entered:

Order.

September 5, 1905.

LOWELL, *J.:*

This cause came on to be heard on the complainant's motion for a temporary injunction and upon the bill of complaint and the affidavits of the complainant and the defendants not appearing and not having filed any affidavits, it is hereby ordered, adjudged and decreed that the defendant, its officers, agents and employees, each and all be and they hereby are, enjoined and restrained, until the further order of this court, from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the resetting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant.

By the Court.

L. C. TUCKER,
Deputy Clerk.

At the same term, the following Answer was filed:

Answer of the Defendant.

(Filed Sept. 26, 1905.)

1. The defendant pleads ignorance of the corporate capacity and character of the plaintiff, and therefore denies that it is a duly established and existing corporation, having authority to do business. The defendant denies that the plaintiff is a citizen of the Commonwealth of Massachusetts.

2. The defendant admits that the Town of Essex is a municipal corporation of the Commonwealth of Massachusetts.

3. The defendant denies that the plaintiff has any authority to maintain and operate lines of telegraph between various states of the United States as alleged; and the defendant denies that the plaintiff is actually engaged at the present time in maintaining and operating lines of telegraph in more than one state of the United States, or in any state of the United States, and the defendant denies that the plaintiff is engaged in the transmission of telegraph messages over its lines between the different states and throughout the United States, including the State of Massachusetts. The defendant denies that the plaintiff has a comprehensive system by which telegraph messages are sent not only throughout the United States, but to and from all parts of the civilized world, or that the plaintiff maintains many offices throughout the United States. The defendant denies that the plaintiff transmits messages from and to the Government of the United States at the City of Washington, or at any other place. The defendant further denies the jurisdiction of this court. It denies that the matter in dispute largely exceeds, inclusive of interest and costs, the sum of two thousand dollars, or that the matter arises under the Constitution and laws of the United States. The defendant has no knowledge that the plaintiff duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of an Act of Congress entitled "An Act to aid in the construction of telegraph lines, and to secure the Government the use of the same for postal, military and other purposes, approved July 24, 1866, and amendments thereto," and therefore it denies this allegation, and calls upon the plaintiff to prove the same. The defendant denies that the plaintiff has transmitted
12 to and from the Government of the United States telegraph messages at rates fixed by the Postmaster General. The defendant denies that the Act of Congress of 1866 authorized the plaintiff to construct, maintain and operate its lines of telegraph over the roads and streets of the defendant without first having obtained a franchise from its Board of Selectmen in accordance with the Statutes of the Commonwealth of Massachusetts; and the defendant further denies that the Act of March 1, 1884, made all public roads subject to the use of the plaintiff for its business purposes without any grant from the legally constituted officers of the defendant, or the legislature of the Commonwealth of Massachusetts. The defendant denies that the Act of March 1, 1884, gave the plaintiff any rights or privileges. The defendant avers that said Act only declared what highways should be used as post routes. The defendant denies that Congress has the authority under the Constitution of the United States to grant to the plaintiff any rights in the public highways of the defendant. It further denies the authority of Congress under the Constitution of the United States to grant to the plaintiff any authority to use the public highways of the defendant without first having obtained the permission of the duly authorized officers of the defendant, or the authority to take such streets or such rights in said streets by the right of eminent domain granted by the Massa-

chusetts legislature. That Congress has no right to grant to the plaintiff rights to use its public town streets without some provision for compensation. This defendant denies that the streets on which the plaintiff claims that it has maintained its lines are post roads within the meaning of the Acts of Congress as aforesaid, but avers that they are simply post routes, the Government by said Act permitting its servants in its post-office department to carry the mail over said streets. This defendant denies that the United States has any interest whatever in these streets or highways. It denies that the United States ever expended any sum of money or performed any services or contributed any valuable thing toward the construction or maintenance of these highways, or that the United States has any control whatever over these highways which will enable Congress to grant to the plaintiff any rights therein to do its private business.

4. The defendant has no knowledge that the plaintiff constructed a line of telegraph from the City of New York to the Trans-
13 atlantic Cable Station in the Town of Rockport, and therefore denies the same. The defendant further denies that the Town of Rockport can and could only be reached by constructing a line either through the defendant or the town of Manchester. This defendant has no knowledge whether the direct route is through the Town of Essex, and whether to construct a line through the Town of Manchester would involve an extremely circuitous route, or whether it would entail great and heavy expenditures of money, and would be an extreme hardship upon the plaintiff; and further the defendant has no knowledge of what action the Town of Hamilton took in fixing a point on the easterly boundary of said Hamilton, nor has it any knowledge as to what action the town of Hamilton took in relation to fixing a point in the westerly boundary in the City of Gloucester as is alleged in the fourth paragraph of the bill, but it denies the authority of the Town of Hamilton to grant any rights to the plaintiff in the City of Gloucester, and it denies the authority of the Town of Hamilton to grant any rights to the plaintiff in the Town of Essex; and it further denies the authority of the City of Gloucester to grant any rights to the plaintiff in the Town of Essex. The defendant denies the allegation that there are absolutely no other roads or highways whatsoever that can be used as a route for the plaintiff's lines than those now occupied by it. The defendant further denies that the plaintiff constructed its line through the Town of Essex with the consent and permission of its Selectmen. The defendant avers that a certain line of telegraph was constructed in its streets without authority or permission of the defendant, or any of its duly authorized officers, and that neither at the time of its construction or ever since has any authority or consent been given by any duly authorized persons, officers or agents in behalf of the defendant. And the defendant further denies that this line has remained substantially as so constructed down to the time of the filing of the bill. And the defendant further denies that the highways are of sufficient width to allow the construction and operation of the plaintiff's line of telegraph without inconvenience to the pub-

lic. The defendant further denies that the plaintiff has obtained any right by prescription or that the line has been in existence for more than twenty years, and avers that the Statutes of Massachusetts provides that the plaintiff obtained no legal right to the continued enjoyment of an easement, or that there is any presumption of a
14 grant thereof, because of the existence of the lines as alleged.

5. The defendant is without knowledge as to the condition of the plaintiff's poles and wires, and therefore denies the allegations in paragraph five as to their condition.

The defendant, denying that the plaintiff ever built a line in said town, admits that within the last twenty years there has been many trees planted, new driveways have been made and buildings erected, and avers if poles have been carried up to an unusual height to clear the trees in the defendant's highways, it has been done without authority, and based upon no right whatsoever. The defendant further denies that the plaintiff's lines in said town needs relocating on the highways in which it now exists. The defendant denies that on June 1, 1905, the plaintiff filed a petition in writing with the Board of Selectmen of the defendant, praying for a location for its poles and wires, and a license to maintain the same in the streets and highways named in paragraph five. The defendant further denies that on the tenth day of July the Selectmen of the town of Essex, at a meeting thereof, voted not to grant to the plaintiff any location for its poles and wires in the town, or that said Selectmen notified the plaintiff to that effect. It is admitted that the town, through its Selectmen, have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town. The defendant denies that any threat was made that the plaintiff would be prevented from attempting to relocate any of its poles in said highways, or that any force was used to stop said relocation. It is admitted that the Selectmen of said Town of Essex forbade the plaintiff from resetting its poles, from changing the location of its poles, from restringing its wires, or from doing business of any sort in said town on the highways of said town until first a franchise was obtained therefor in accordance with the laws of the Commonwealth of Massachusetts. The defendant denies that there is extreme peril to life and limb, and as to the allegation of there being imminent danger of there being a break and interruption in the plaintiff's line of telegraph running from the City of New York to the Cable Station in the Town of Rockport, the defendant has no knowledge and therefore denies the same. And the
15 defendant also denies that the plaintiff's lines within the Town of Essex forms an important link in the Interstate and International telegraph system, maintained and operated by the plaintiff. The defendant has no knowledge as to the shortest routes to the various European places of great importance, or the value to the plaintiff of the integrity of the plaintiff's lines in view of the approaching Russian-Japanese Conference as alleged, or that a new cable is now being laid and it neither admits or denies said allegations, but calls upon the plaintiff to prove them. The defendant further denies that any interruption or break in the plaintiff's system in the Town

of Essex would cause to many people in the United States, and the government of the United States itself, any embarrassment.

6. The defendant denies the allegations of law contained in the sixth paragraph of the bill, and avers that this company has not now, and never had any rights whatsoever in the highways of the Town of Essex, either by grant from Congress, from the General Court of Massachusetts or from the Selectmen of the Town of Essex, or any other legally constituted authority. The defendant further answering says that the plaintiff, without permission and without right, erected poles and strung its wires in the year 1884 through the following named streets in the Town of Essex, Western Avenue, Main Street and Eastern Avenue; that no written specifications were ever given to the plaintiff by the Selectmen of the defendant under Chapter 109 of the Public Statutes of Massachusetts so to do, or Acts in amendment thereof, or under Chapter 25 of the Revised Laws of Massachusetts. That some time in the month of June, 1905, some company (the New England Telegraph Company of New York) not the plaintiff, filed a petition with the Board of Selectmen for a location of poles and wires and a license to maintain the same, which petition was refused. The defendant further avers that it never gave any location to the plaintiff to go through or into the highways of the defendant, and it has never consented that the plaintiff should maintain its poles and wires in its highways, and if the plaintiff now has any poles or wires therein, they are there without right. And the defendant further avers that the plaintiff is now out of business, that its entire assets have been transferred to the Farmers' Loan & Trust Company of New York, or to some other corporation, and that the plaintiff now has no interest whatever in any telegraph lines,
16 interstate or otherwise.

And the defendant further answers that the bill is defective and should be dismissed on the following grounds:—

A. The interest in the highways of the defendant upon which the plaintiff's case is predicated is by law required to be in writing and the bill does not contain an allegation to that effect.

B. That the bill shows that the plaintiff has sufficient remedy at law, and therefore there is no jurisdiction in equity.

C. That the plaintiff shows no title whatever for relief.

D. That the bill does not contain sufficient allegations to give this court jurisdiction, as this is a controversy between alleged citizens of the same state, which does not arise under the laws of the United States, but is a controversy that is governed entirely by the laws of Massachusetts and its courts.

This defendant prays that it may have the same benefit and advantages under this answer as if the matters and things herein set forth had been pleaded by way of a plea or demurrer, and the defendant further prays for its costs.

TOWN OF ESSEX,
By AARON COGSWELL,
FRANK E. McKENZIE,
ENOCH B. KIMBALL,
Selectmen of Essex, Mass.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

Aaron Cogswell, being duly sworn, deposes and says that he is Chairman of the Board of Selectmen of the defendant; that he has read the foregoing answer and knows the contents thereof; that all the matters therein stated as to the acts of said defendant he knows to be true; that all other matters therein stated he believes to be true.

AARON COGSWELL.

Subscribed and sworn to this 25th day of September, 1905, before me,

[SEAL.] EBEN F. STANWOOD,
Notary Public.

Affidavit of Counsel.

I, Frank C. Richardson, being of counsel for the defendant, hereby certify that in my opinion the matters herein stated as grounds for demurrer are well founded in point of law, and that they are
17 not interposed for delay.

FRANK C. RICHARDSON.

On the same day, the following Cross-Bill was filed by defendant:

Cross-bill of Defendant, Town of Essex.

(Filed September 26, 1905.)

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

The inhabitants of the Town of Essex, a municipal corporation in the Commonwealth of Massachusetts, and a citizen of the State of Massachusetts, by its Board of Selectmen brings this its cross-bill against the New England Telegraph Company of Massachusetts, and a citizen of the State of Massachusetts, and thereupon your orator complains and says:—

1. That the defendant herein, the Town of Essex, is a municipal corporation duly organized, and existing in the Commonwealth of Massachusetts.

2. That the defendant has all the powers, rights and privileges, burdens and liabilities over its roads and highways that are common to municipalities that have been incorporated in the Commonwealth of Massachusetts, and that are mentioned in its charter dated February 15, 1819 from the Great and General Court of said Commonwealth.

3. That from time to time the defendant has established public highways within its borders and at its sole expense has built and maintained the same from time immemorial. That among those

public highways so constructed and maintained are the following named streets,—Western Avenue, Main Street and Eastern Avenue.

4. That the Government of the United States, or any body corporate or person whatsoever, have no interest in these highways except the inhabitants of said town who are abutters thereon, and who own the fee in said streets subject to the right of the public to pass and repass thereon.

5. That the plaintiff, the New England Telegraph Company of Massachusetts, is a corporation organized for private purposes, and for the purpose of making a profit for its several stockholders. That it has no interest in the Government of the United States beyond the interest of any of its citizens, and that the Government of the United States has no interest in the plaintiff and no connection with
18 the plaintiff beyond its interest and connection with its other citizens. That the State of Massachusetts has given to the plaintiff no legislative grants whatever, and it has no power or rights of eminent domain.

6. That the plaintiff, the New England Telegraph Company of Massachusetts, was organized under the general laws of Massachusetts, Public Statutes Chapter 106, April 7, 1884, with a capital stock of $30,000, divided into 300 shares of the par value of $100. That by its last return to the Commissioner of Corporations in said Commonwealth dated August 17, 1905, it certified that at its last annual meeting held on August 8, 1905, its entire stock was owned and held by the Farmers' Loan & Trust Company as trustee. That its entire assets consisted of poles and wires valued at $15,000.

7. That the Statutes of the Commonwealth of Massachusetts provide that the selectmen of the town through which the line- of a telegraph company are to pass, shall give the company a writing specifying where the posts may be located, the kind of posts, the height at which and where the wires may be run, and may empower citizens of Massachusetts to establish and maintain in such town posts, wires and other apparatus for telegraphic communication. That before a company organized for the purposes specified in the bill as the plaintiff alleges it was organized for, obtains any rights in the streets of any of the municipalities of Massachusetts, it was obligatory upon the plaintiff to obtain the consent of the selectmen of said town in accordance with the Statutes of said Commonwealth.

8. That some time in the year 1884, without obtaining the consent of the selectmen of the defendant, and without obtaining any right whatsoever in the defendant's streets mentioned as aforesaid, the plaintiff by its servants and agents erected wires and poles in the streets of the defendant hereinbefore mentioned, and has since maintained the same for *their* private business purposes and profit against the objection of the defendant and its Board of Selectmen.

9. That for several years the defendant did not know who was responsible for the maintenance of these poles. It did not know who was responsible for the erection of the poles and wires mentioned, and was not certain until the bringing of this bill, who
19 claimed to own these poles and wires mentioned as aforesaid, but since the bringing of this bill the selectmen of the de-

fendant have requested the plaintiff to forthwith remove its poles and wires from its streets as aforesaid, but the defendant has refused and neglected so to do.

10. That it is provided by the laws of Massachusetts that the enjoyment by any corporation for any length of time of the privilege of having or maintaining telegraph poles, wires or apparatus in, upon and over any streets or public highways, shall give no legal right to the continued enjoyment of such easement or raising any presumption of a grant thereof.

11. That the defendant, through its Board of Selectmen, have done everything in their power to induce the plaintiff to remove its said poles and wires from the highways of the defendant, but the plaintiff has refused, and continues to refuse so to do, and therefore continues to trespass upon the highways of the defendant, without right and without authority, and threatens to continue so to do.

12. That since this bill has been filed and the preliminary injunction issued herein restraining the defendant, its officers, agents and employees from interfering in any manner whatsoever with the relocation by the plaintiff on the roads and highways now occupied by its line of telegraph in said town, the plaintiff has not only made repairs upon its poles and line of telegraph, but it has reset said poles in different locations. It had changed the line of telegraph from its original location upon said streets, and has done many other things under the protection of the restraining order of this court which it has no authority so to do.

Wherefore your orator prays,

1st. That the plaintiff, its officers, agents and employees, each and all, be ordered to forthwith take up its poles from said streets and to leave said streets reasonably safe and convenient for travel as they were before the plaintiff entered thereon.

2nd. And your orator further prays that the plaintiff, its servants, officers and agents, be restrained from using said poles and wires for its business purposes until it shall have first obtained a franchise from the Board of Selectmen of the defendant, as is provided by the laws of the Commonwealth of Massachusetts.

3rd. And that your orator may have such other or further relief or both in the premises as the nature of the case shall require, and — your Honors shall seem meet and agreeable to equity and good conscience.

Answer under oath is hereby expressly waived by your orator to this cross-bill.

AARON COGSWELL,
FRANK E. McKENZIE.
ENOCH B. KIMBALL,
Selectmen of Essex.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

On this 25th day of September, A. D. 1905, before me, Eben F. Stanwood, a Notary Public, duly commissioned and qualified for the Commonwealth of Massachusetts personally appeared Aaron

Cogswell, Frank E. McKenzie and Enoch B. Kimball, who, being duly sworn, declared, that the annexed statement, by them subscribed is true to the best of their knowledge and belief.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, the day and year above written.

[SEAL.] EBEN F. STANWOOD,
Notary Public.

This cause was thence continued from term to term to the February Term, A. D. 1906, when, to wit, March 16, 1906, the following Answer of New England Telegraph Company of Massachusetts to the Defendant's Cross-Bill was filed:

Answer of New England Telegraph Company of Massachusetts to the Defendant's Cross-bill.

(Filed March 16, 1906.)

First. The complainant admits the allegations in the first paragraph of the cross bill contained.

Second. The complainant admits that the defendant has all the powers, rights, privileges, burdens and liabilities set forth in the second paragraph of the cross-bill, subject, however, to the rights conferred by the Congress of the United States upon the complainant.

Third. The complainant admits the allegations in the third paragraph of the cross-bill contained.

21 Fourth. The complainant denies that the Government of the United States or any body corporate or person whatsoever has no interest in the highways referred to in paragraph 4 of the cross-bill except the inhabitants of the Town of Essex who are abutters thereon and who own the fee in said streets subject to the right of the public to pass and repass thereon.

Fifth. The complainant admits that the New England Telegraph Company of Massachusetts is a corporation organized for private purposes and for the purpose of making a profit for its several stockholders, but the complainant denies that it has no interest in the Government of the United States beyond the interest of any of its citizens and denies that the Government of the United States has no interest in the complainant and no connection with the complainant beyond its interest and connection with its other citizens, and denies that the State of Massachusetts has given to the complainant no legislative grants whatever and denies that the complainant has no power or rights of eminent domain. On the contrary the complainant says that by filing its written acceptance with the Postmaster General under Section 5268 of the United States Revised Statutes of the restrictions and obligations required by laws of Congress, the complainant became entitled to construct, maintain and operate its lines of telegraph through and over and along any of the military or post roads of the United States. That by an Act of Congress of March 1, 1884, entitled "An Act Making all Public Roads and Highways Post

Roads" (23 Stats. 3) all public roads and highways while kept up and maintained as such, were declared to be post roads; that under the provisions of this Act the roads and highways upon which the complainant has constructed its line of telegraph in the Town of Essex are post roads. That under Section 5265 of the United States Revised Statutes, telegrams between the several departments of the United States Government and their officers and agents, in their transmission over the lines of the complainant, have priority over all other business at such rates as the Postmaster General shall annually fix; that under Section 5267 of said Statutes, the United States are entitled to purchase the telegraph lines, property and effects of the complainant at an appraised value to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested and one by the four so previously selected; and that the complainant by an Act of the Legislature of the State of Massachusetts was chartered with the right to construct and operate its line of telegraph upon and along the highways and public roads of said State.

Sixth. The complainant admits the allegations in the sixth paragraph of the cross-bill contained.

Seventh. Answering the allegations of the first sentence of the seventh paragraph of the cross-bill, the complainant says that the provisions of the Statutes of the Commonwealth of Massachusetts in respect to the matters in question are contained in Chapter 237 of the Acts of the year 1903, and the complainant prays leave to refer to said Act for such provisions.

The complainant denies that before a company organized for the purposes for which the complainant company was organized obtains any rights in the streets of any of the municipalities of Massachusetts, it was obligatory upon the complainants to obtain the consent of the Selectmen of the Town of Essex, in accordance with the Statutes of the Commonwealth.

Eighth. The complainant denies that sometime in the year 1884, without obtaining the consent of the Selectmen of the defendant, and without obtaining any rights whatsoever in the defendant's streets mentioned as aforesaid, the complainant by its servants and agents erected wires and poles in the streets of the defndant hereinbefore mentioned and has since maintained the same for its private business interests and profit against the objection of the defendant and its Board of Selectmen.

Ninth. The complainant denies that for several years the defendant did not know who was responsible for the maintenance of these poles.

The complainant denies that the defendant did not know who was responsible for the erection of the poles and wires mentioned and was not certain until the bringing of this suit who claimed to own these poles and wires mentioned as aforesaid.

The complainant admits that since the bringing of this bill the selectmen have requested the plaintiff to forthwith remove its poles

and wires from its streets as aforesaid, and that the complainant has refused so to do.

23 And further answering the complainant says that both before and since the bringing of this bill the defendant has demanded that the complainant altogether remove its poles and wires from the Town of Essex, and has threatened to compel it so to do.

Tenth. Answering the allegations contained in the tenth paragraph of the cross bill, the complainant says that the provisions of the laws of Massachusetts in respect to the matters therein set forth are contained in Section 26, of Chapter 122 of the Revised Laws of said Commonwealth, to which the complainant prays leave to refer.

Eleventh. The complainant admits that since the original bill was filed and the preliminary injunction issued, the complainant has made repairs upon its poles and line of telegraph and has re-set a few poles in different locations, but it denies that it has changed the line of telegraph from its original location upon said streets, and denies that it has done anything under the protection of the restraining order of this court which it had no authority to do.

By Its Attorney-, CARVER & BLODGETT.

At the same term, a Replication was filed by the Town of Essex on the twenty eighth day of March, A. D. 1903, and on the thirtieth day of said March, a Replication was filed by the New England Telegraph Company.

24 This cause was thence continued from term to term to the March Term of the District Court, A. D. 1912, when, to wit, April 17, 1912, the following Agreement as to Facts was filed:

Agreement as to Facts.

(Filed April 17, 1912.)

The parties agree that prior to the time of the filing of the bill, the plaintiff had erected and had up to that time for years maintained a telegraph line in the defendant town. The telegraph line was located on Western Avenue. Main Street and Eastern Avenue, is the only telegraph line of the plaintiff situated in the Town of Essex, and consisted of about 186 poles with a number of wires strung thereon.

At the time of the filing of the bill and for several years prior thereto there were seven wires.

There had previously been six wires. The telegraph line was four miles in length. The United States Government never contributed any sum toward the construction or care of the above mentioned highways. The Massachusetts Statutes have been introduced in evidence.

G. PHILIP WARDNER,
Attorney for Petitioner.
WILLIAM B. SULLIVAN,
FRANK C. RICHARDSON.
Attorneys for Respondent.

This cause was thence continued from term to term to the March Term, A. D. 1913, when, to wit, June 23, 1913, this cause was set down for hearing on the pleadings and evidence and fully heard by the Court, the Honorable Frederic Dodge, Circuit Judge duly assigned to hold said District Court, sitting.

Said cause was thence continued under advisement to the June Term, A. D. 1913, when, to wit, August 14, 1913, an Opinion of the Court was announced, dismissing cross-bill and granting a permanent injunction, as prayed for in bill.

This cause was thence continued to the present September Term, A. D. 1913, when, to wit, October 27, 1913, the following Final Decree is entered:

25 *Final Decree.*

October 27, 1913.

DODGE, *J.:*

This cause came on this day to be heard upon the bill as amended and cross-bill, the respective answers thereto and the respective replications of the parties, all heretofore filed, as well as on the evidence of the respective parties as filed and presented to the Court, and having been argued by counsel for the respective parties, it is now, therefore, in consideration thereof and in accordance with the opinion of this court heretofore rendered, ordered, adjudged and decreed that a perpetual injunction issue in this suit restraining the defendant, its officers, agents and employees from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the resetting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant; that the cross-bill be and it hereby is dismissed, and that complainant be allowed costs on the original bill and on the cross-bill.

By the Court:

CHARLES K. DARLING, *Clerk,*
By JOHN E. GILMAN, JR.,
Deputy Clerk.

From the foregoing Final Decree the defendant claims an appeal to the Supreme Court of the United States, and appeal bonds having been waived by the New England Telegraph Company of Massachusetts, said appeal is allowed.

A true record:

Attest:

CHARLES K. DARLING, *Clerk.*

26 *Opinion of the Court on Pleadings and Proofs.*

August 14, 1913.

DODGE, *J.:*

This bill was filed July 31, 1905. The defendant Town has been under a temporary injunction since Sept. 5, 1905, which it has never moved to dissolve. On Sept. 26, 1905, it filed a cross-bill against the plaintiff. This has been followed by an answer and a replication, as has the original bill.

Both plaintiff and defendant are Massachusetts corporations. The plaintiff was incorporated April 7, 1884, "for the purpose of constructing lines of aerial or underground wires of telegraph both within and without the limits of (the) Commonwealth and the owning, constructing, maintaining and operating lines of aerial or underground electric telegraph, both within and without the limits of said Commonwealth and the owning of interests in such lines," with a capital of $30,000. It is therefore a telegraph company within the meaning of Rev. Stats. Secs. 5263-5269, which are the laws of the United States under which the controversy between the parties, involving more than $2,000., is said to arise.

Sec. 5263 has given to any telegraph company, organized under the laws of any State since its enactment, the right to construct, maintain and operate lines of telegraph over and along any of the post roads of the United States which have been or may hereafter be declared such by law. It provides, however, that such
27 lines shall be so constructed and maintained as not to interfere with the ordinary travel on such post-roads.

Sec. 5263 gives priority over all other business, at such rates as the Postmaster General shall annually fix, to telegrams between the Government Departments, their officers and agents, in transmission over the lines of any telegraph company having the right of way provided for in Sec. 5263.

Sec. 5267 gives to the United States the right to purchase all the telegraph lines and property of any company acting under Sec. 5263, at an appraised value to be ascertained according to other provisions contained in the section.

Sec. 5268 requires the filing of a written acceptance, with the Postmaster General, of the restrictions and obligations required by law, before the exercise by any telegraph company of the powers and privileges conferred by Sec. 5263.

I find no other provisions in the sections referred to material for the purposes of this case. The plaintiff avers that it has filed the acceptance required by Sec. 5268, and has transmitted Departmental messages in accordance with Sec. 5263, and has in all other respects complied with the requirements of the sections referred to. These averments are sustained by the evidence.

The following facts appear by admission or from the evidence. After its incorporation in April 1884, the plaintiff constructed a telegraph line, about four miles in length, consisting of 186 poles and

wires thereon, carried through Essex from the line between it and the adjoining Town of Hamilton, through highways or roads within Essex known as Western Avenue, Main Street and Eastern Avenue, to the line between Essex and the adjoining Town of Gloucester. The line constructed formed part of a line constructed by the plaintiff through Massachusetts from the Rhode Island line to Rockport, passing on its way through various Massachusetts towns or cities which need not be specified. At Rockport it connects with a line of telegraph cable to Europe. At the Rhode Island line it connects directly or intermediately with telegraph lines constructed by telegraph companies in alliance with the plaintiff, affording telegraphic communication to points throughout the United States. It
28 was constructed to be and it has been since used as part of a system of lines in connection, affording telegraphic communication between these United States points and Europe, as well as between points on the connected lines within the United States. During the twenty-one years from 1884 to 1905, the plaintiff maintained and operated the line constructed through Essex as above, without interference on the part of that Town. The evidence does not show any interference by this line with the ordinary travel on the roads mentioned.

On June 1, 1905, repairs to the line through Essex having become necessary, and relocation desirable in connection with them, an application for a location through the roads above mentioned was presented to the Essex Selectmen. It was stated in the application that the new poles were to occupy practically the positions occupied by the old ones, and that any changes in the present location were to be under the direction of the Selectmen. This application was made in the name of the New England Telegraph Co. of New York, one of the companies with which the plaintiff was allied in the maintenance and operation of the through line above described. After a hearing, the Selectmen voted, on July 10, 1905, not to grant "the New England Telegraph Co." a location. Under date of July 11, 1905, they sent a notice to that effect addressed to "New England Telegraph Co., 84 State St., Boston, Mass." I find that their refusal to grant the application was not upon the ground that it was applied for in the name of the New England Telegraph Co. of New York instead of in the name of the plaintiff, but was a refusal, upon other grounds below appearing, to grant the plaintiff or any company connected with it, any location within the Town. At a subsequent conference between the Selectmen and representatives of the plaintiff, it was stated to the plaintiff, by or on behalf of the Selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the Town. Also that the Selectmen wanted the poles taken entirely out of the Town and would prevent construction work by force if necessary. The Selectmen or their Chairman were asked if there was objection to the repair of the line as it stood, merely replacing old poles with new

ones. The reply was, that there was objection, and that any
29 work by the company within the Town would be stopped.

The temporary injunction issued September 5, 1905, in this case, forbade the Town, until the further order of the Court, to interfere in any manner with the plaintiff's line or its relocation on the roads and highways then occupied thereby or with the resetting of its poles, or the making of necessary repairs. The defendant did not appear to oppose the granting of this injunction. The bill asks for a permanent injunction to the same effect.

In the cross-bill, filed by the Town on September 26, 1905, it is alleged that the plaintiff's line was erected without obtaining any rights whatever in the highways and roads mentioned, which were alleged and are admitted to be public highways; that the defendant had requested the plaintiff, since its bill was filed, to remove its poles and wires, which the plaintiff had refused to do; that it was trespassing upon the defendant's highways without right and without authority and was threatening to continue to do so; that it had, since the preliminary injunction issued, not only repaired its line, but had reset its poles in different locations, and that it had changed its line from its original location. The cross-bill asks that the plaintiff be ordered to remove its poles, and for an injunction forbidding the plaintiff to use its line within Essex for the purposes of its business until it shall have first obtained a franchise from the Board of Selectmen, as provided by the laws of Massachusetts. In the plaintiff's answer the request and refusal to remove are admitted, also the resetting of a few poles in different locations. The other allegations are denied. I find, on the evidence, that the admitted changes in the location of some of the poles were only such as were necessary to keep the line in a reasonably safe condition, and that there have been no changes amounting to a change of the location occupied in 1884 and since.

The defendant's contentions are based upon provisions contained in the Statutes of Massachusetts, Chap. 122, "Of Companies for the transmission of Electricity," in Sec. 1, authorizes any company incorporated for the transmission of intelligence by electricity to construct lines for such transmission upon and along the public
30 ways within Massachusetts under the provisions of sections which follow. Sec. 2 provides that the Selectmen of a Town through which lines of such a company are to pass "shall give the company a writing specifying where the poles may be located, the kind of poles and the height at which and the places whereon the wires may run," also that when the lines are erected, the Selectmen "may direct any alteration in the location or erection of the poles * * * and in the height of the wires," after an opportunity to be heard given the company, all specifications and decisions made to be put on the Town records. Sec. 26 provides that no enjoyment for the purposes specified in Sec. 1, for any length of time, of the privilege of maintaining poles or wires in, upon or over the land of other persons shall give a legal right to continue the enjoyment of such privilege, or raise any presumption of a grant thereof. There are also provisions in Chap. 25, Sec. 56, that the Selectmen of Towns

may authorize citizens of the State to establish and maintain, in their Town, poles, wires and other apparatus for telegraphic communication in conformity with Chap. 122. All these provisions were contained in the Public Statutes, superseded in 1902 by the Revised Laws, but in force from 1884 to 1902. The defendant contends that the plaintiff's right to construct or maintain its line in Essex depends upon these provisions, and that unless it can show authority under them, it was and is without any right either to construct or to maintain its line. It contends that the Acts of Congress referred to give the plaintiff no rights for those purposes in the public highways of the Town through which the line passes.

If these highways are "post-roads" within the meaning of Rev. Stats. 5263, the plaintiff's right under that section to construct, maintain and operate its line cannot be denied, the plaintiff having, as above shown, met all the requirements of the Federal Statutes upon which this right is made to depend. Whether the public highways here in question, or any of them, were established as post-roads by Rev. Stats. 3964, it is unnecessary to consider, because, subsequently to the Revised Statutes, on March 1, 1884, Congress enacted that

"all public roads and highways while kept up and main-
31 tained as such are hereby declared to be post-routes" (23 Stats. 3). That "post-routes" as there used means anything different from "post-roads," I am unable to believe, in view of the decisions which have treated this enactment as an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish Post-Offices and Post-Roads." In Western &c. Co. v. Penna. R. R. Co., 195 U. S. 540, 557, it is said that by the Acts of Congress, railroads within the United States were made "post-routes or roads." See also Western &c. Co. v. Richmond, 224 U. S. 160, 165, 166, where the Act of March 1, 1884, is cited with Rev. Stats. 3964 as having made all public highways post-roads. A recent District Court decision, Mackay Co. v. Texarkana, 199 F. R. 347, 348, refers to these enactments as "the post-roads Act and amendments thereto."

However it might be in the case of a telegraph company doing a purely private business, confined, for all purposes, within the limits of a State,—there can be no doubt that in the case of a company like the plaintiff, engaged in transmitting interstate, international and Government messages, the legislation of Congress, so far as it has gone, is supreme; because of the powers possessed by Congress to regulate for the whole nation its commerce between the States and with foreign nations, and also the operation of the national postal service.

While the plaintiff owes its existence, its capacity to contract, its right to sue and be sued and to exercise the business of telegraphy to the laws of Massachusetts, under which it is organized, it holds its privilege to run its lines through the post-roads referred to under the laws of Congress. Western &c. Co. v. Mass., 125 U. S. 530, 548. No State can exclude a telegraph company which has accepted the terms proposed by the national Government for this national privilege, from prosecuting its business within the State. Western &c. Co. v. Penna. R. R. Co., 195 U. S. 540, 562. It is true that the

authority granted by Congress to such a company is merely permissive, and gives no right to use the soil, even of post-roads, as against private owners or as against the State or municipality where it owns the land. Western &c. Co. v. Richmond, 224 U. S. 160, 169. No title is acquired by the mere exercise of the author-
32 ity granted, nor is any right of eminent domain included. A company exercising the authority may be required to make reasonable compensation to the municipality entitled, for the occupation of its post-roads. St. Louis v. Western &c. Co., 148 U. S. 92. The company is subject to the taxing power of the State, and to the imposition by the State of police or other regulations not inconsistent with those established by Congress. The taxes imposed, however, must not be of a character, nor the methods of collecting them such as to effect the exclusion of the company from the State or the stoppage of its business. The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the State or forbidding it to carry on its business therein. A State cannot so exclude or prohibit, either directly or indirectly. Western &c. Co. v. Mass., 125 U. S. 530, 548. Postal &c. Co. v. Adams, 555 U. S. 688, 696. And if the State cannot so exclude or prohibit, no town within the State can do so under State authority. To concede such power to a town might be, in some cases, to enable one town to shut out all telegraph wires from territory beyond it and not accessible save through it.

Ownership of the soil of these post-roads is not claimed by the defendant Town, which justifies its attempt to exclude the plaintiff, or stop the operation of its line within Essex, only by the claim that the company has never obtained a location for the line from the Town authorities, according to the State Statute. As has been stated, the specification in writing provided for by Chap. 122, Sec. 2, Rev. Laws, has been, though applied for, expressly withheld and refused since 1905; nor is the evidence sufficient to prove that such a specification was ever given the plaintiff by the Selectmen. None is produced by the plaintiff, nor is any record of one found in the Town records. But the laws of Massachusetts nowhere penalize or make illegal the construction of a telegraph line like this without the permit or specification. See Suburban &c. Co. v. Boston, 153 Mass. 200. And no failure on the plaintiff's part to do anything which the Town has the right to require under the Statutes, State or Federal, or can otherwise reasonably require as a condi-
33 tion of giving the specification, appears. The plaintiff has been, at least since 1905, constantly in the attitude of requesting the Town to give the specification.

Under these circumstances, I am unable to hold that the plaintiff is not lawfully occupying its location within Essex, or is not lawfully operating its line within that Town. In view of the Federal Statutes and their scope, I can find nothing in the Massachusetts legislation referred to, nor in the facts as shown, which can have the effect of abridging or restricting the plaintiff's rights to maintain and operate the line referred to.

The cross-bill must therefore be dismissed and a permanent injunction will issue as prayed for in the bill.

34 *Petition for Appeal and Supersedeas.*

(Filed October 27, 1913.)

To the Honorable Judge of the District Court of the United States for the District of Massachusetts:

Your petitioner the Town of Essex, conceiving itself aggrieved by the final decree of said District Court made and entered on October 27th, 1913, hereby appeals from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors herewith filed, and prays that this appeal may be allowed and that the said decree may be suspended during the pendency of this appeal; that a transcript of the record on appeal including the finding of the Judge, upon which said decree was made, together with the decree, all duly authenticated, may be sent to the Supreme Court of the United States, and that said decree may be reviewed and reversed by the Supreme Court of the United States and that your petitioner may be given such further relief as may be proper in matters of this character.

TOWN OF ESSEX,
By Its Attorneys, WILLIAM B. SULLIVAN.
FRANK C. RICHARDSON.

Assignment of Errors.

(Filed October 27, 1913.)

The Town of Essex respectfully says that the decree made and entered in this case on the 27th day of October, 1913, ordering a perpetual injunction to issue as prayed for in the bill and dismissing the cross-bill of the Town of Essex, is erroneous and hereby assigns as error in making an entry of said decree the following, to wit:

1. That the court erred in granting said injunction as prayed for, whereas it should have dismissed said bill.

2. That the court erred in dismissing the cross-bill of the Town of Essex, whereas it should have granted to the Town of Essex the relief asked for.

3. That said decree is erroneous in that it holds that the following Statutes of Massachusetts in force at the time the line of the New England Telégraph Company of Massachusetts was erected are unconstitutional, and in that said Massachusetts Acts are unreasonable and repugnant to the Acts of Congress of July 24, 1866, or the Constitution of the United States:

35 Public Statutes, Chap. 109, § 1:

Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter.

Public Statutes, Chap. 109, § 2:

Each company may under the provisions of the following section construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the Commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters.

Public Statutes, Chapter 109, Section 3:

The Mayor and Aldermen or Selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts and the height at which, and the places where, the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town.

Public Statutes, Chapter 27, Section 49:

The Selectmen of the town may empower citizens of Massachusetts to establish and maintain in such town posts, wires and other apparatus for telegraphic and telephonic communication in conformity with the provisions of Chapter 109.

Public Statutes, Chapter 109, Section 15:

No enjoyment by a person or corporation for any length of time of the privileges of having or maintaining telegraph posts, wires or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued en-
36 joyment of such easements or raise any presumption of a grant thereof.

4. That said decree is erroneous in that it holds that the following Massachusetts Statutes contained in the Revised Laws of Massachusetts in force when the bill was filed, are an unreasonable regulation and are repugnant to the Act of Congress of July 24, 1866, or the Constitution of the United States:

Revised Laws, Chapter 122, Section 1:

A company which is incorporated for the transmission of intelligence by electricity, or by telephone, whether by electricity or otherwise, or for the transmission of electricity for lighting, heating, or power, except lines for heat or power by a street railway company, may, under the provisions of the following sections, construct lines for such transmission upon and along the public ways and across any waters within the Commonwealth, by the erection of the poles, piers, abutments and other fixtures, except bridges, which may be

necessary to sustain the wires of its lines; but shall not incommode the public use of public ways nor endanger or interrupt navigation.

Revised Laws, Chapter 125, Section 56:

Selectmen may authorize citizens of the Commonwealth to establish and maintain, in their town, poles, wires and other apparatus for telegraphic and telephonic communication, in conformity with the provisions of chapter one hundred and twenty two and other laws applicable to telegraph or telephone companies.

Revised Laws, Chapter 122, Section 2:

The mayor and aldermen of the city or the selectmen of a town through which the lines of a company are to pass, shall give the company a writing, specifying where the poles may be located, the kind of poles, and the height at which, and the places where the wires may run. After erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the poles, piers or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town.

37 Revised Laws, Chapter 122, Section 26:

No enjoyment for the purposes specified in Section 1 of this Chapter (constructing lines for the transmission of intelligence by electricity) by a person or corporation for any length of time of the privilege of having or maintaining poles, wires or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement, or raise any presumption of a grant thereof.

Acts of 1903, Chapter 237:

The Mayor and Aldermen of a city or the Selectmen of a town through which the lines of a company are to pass shall give the company a writing specifying where the poles may be located, the kind of poles, the height at which, and the places where the wires may run. Any company, except street railway companies, desiring permission to erect poles, piers, abutments or other fixtures upon or along any public way shall, in writing petition the said Mayor and Aldermen or Selectmen therefor. A public hearing shall be held on such petition, and written notice of the time and place at which such hearing will be held shall be mailed at least three days before said hearing, by the clerk of the city or town in which the petition for locations has been made, to the owners of real estate along the ways or parts of ways upon which it is proposed to construct said line, as determined by the last preceding assessment for taxation. The clerk of the city or town shall endorse upon the order or specification of locations granted, his certificate that notices were sent and a hearing held as herein provided, and no such order or specification shall be valid without such certificate. After the erection of the lines the mayor and aldermen or selectmen may, after giving the company or its agents an opportunity to be heard, or upon petition of the com-

pany without hearing or notice, direct any alteration in the location or erection of the poles, piers or abutments, and in the height of the wires; and no permit shall be required for renewing, repair-
38 ing or replacing poles, piers, abutments or other fixtures once erected under the provisions of law. Such certificates, specifications and decisions shall be recorded in the records of the city or town.

5. That said decree is erroneous in that it holds that said Massachusetts Statutes are not a reasonable regulation within the Police Power of the State of Massachusetts, and are repugnant to the Act of Congress of July 24, 1866, and the Constitution of the United States.

6. That said decree is erroneous in that it holds that the Act of July 24, 1866, authorized private telegraph companies to do that which the people in adopting the United States Constitution did not give Congress the right or authority to do in behalf and for the Government of the United States of America.

7. That said decree is erroneous in that Congress has no authority under the Constitution to establish a telegraph company and had no authority to grant to a telegraph company the property of the United States or of any of its citizens.

8. That the Post Road Statute is confiscatory of property and rights without providing compensation, and that said decree is erroneous in that said Post Road Act is unconstitutional.

9. That the decree is erroneous in holding that the Post Road Act was intended to confer a franchise upon the New England Telegraph Company of Massachusetts and other companies accepting the provisions of that Act in such a way as to put it beyond the power of the state in which the poles and wires were to be located to make any laws that would regulate the location of said poles or wires.

10. That the decree is erroneous in holding that Congress had the right to exercise exclusive legislation over the highways in the Town of Essex in the State of Massachusetts, on which the telegraph lines are laid under the Constitution of the United States in passing the Post Roads Act, because there is no finding that the National Government purchased said highways by the consent of the Massachusetts Legislature.

11. That the entry of said decree is erroneous in that it was based on the finding that "there can be no doubt that a company like the plaintiff, engaged in transmitting interstate, international
39 and government messages, the legislation of Congress so far as it has gone, is supreme, because of the powers of Congress to regulate for the whole nation its commerce between the states and with foreign nations and also the operation of the national postal service", as Congress is nowhere given the power in the Constitution of the United States to grant rights in the highways of any state to companies like the plaintiff, being subject to regulation and supervision by the State Legislature acting within its Police Power.

TOWN OF ESSEX.
By Its Attorneys, WILLIAM P. SULLIVAN.
FRANK C. RICHARDSON.

Waiver of Appeal Bonds.

(Filed Oct. 27, 1913.)

Now comes the New England Telegraph Company of Massachusetts and waives the giving of all bonds herein; this waiver not to effect the temporary injunction heretofore issued in this case.

NEW ENGLAND TELEGRAPH COMPANY
OF MASSACHUSETTS,
By G. PHILIP WARDNER, *Its Attorney.*

Order Allowing Appeal.

October 27, 1913.

DODGE, *J.:*

This day the Town of Essex presented its petition for the allowance of an appeal in the above entitled action to the Supreme Court of the United States, which prayer for appeal is hereby allowed.

As the New England Telegraph Company of Massachusetts has waived the filing of an appeal bond no such bond need be given.

By the Court:

CHARLES K. DARLING, *Clerk.*

40 District Court of the United States for the District of Massachusetts.

No. 32. Equity.

NEW ENGLAND TELEGRAPH COMPANY
v.
TOWN OF ESSEX.

Condensed Statement of Evidence.

(Filed Dec. 22, 1913.)

The New England Telegraph Company is hereinafter called the Company, and the Town of Essex is hereinafter called the Town.

Charles P. Bruch, Treasurer of the Company, testified that the telegraph line in the Town was constructed about 1884, and since that time had been operated and maintained by the Company; that the Company had no lines or property outside of Massachusetts; that there was another telegraph company, named the New England Telegraph Company of New York, which Company, however, had no telegraph lines or other property in Massachusetts, and did no business therein and had nothing whatsoever to do with the construction, operation and maintenance of the line of telegraph of which the line in Essex was a part; that so far as the public was concerned the New England Telegraph Company of Massachusetts did

its business under the name of Postal Telegraph Cable Company,
Postal Telegraph, or Postal Telegraph system, or Postal Tele-
41 graph Commercial Cable system; that there were a large number of corporations organized under the laws of the various states, all doing a commercial telegraph business for the public, or the United States Government and in the course of that business handling telegrams not only between various states and within the states, but also collecting and transmitting and delivering cablegrams between the United States and foreign countries; that in order to identify this business as a business of one telegraph system, these companies use, in dealing with the public, the above mentioned names; that so far as the construction, operation and maintenance of the line was concerned, and so far as the relations of the company with the towns and state were concerned, it had always used the name of New England Telegraph Company of Massachusetts in all formal transactions; that its returns to the state were made in that name; that the business done over the line of the Company was the handling of telegrams for the public, the handling of cablegrams to and from the cable terminus at Rockport, and the handling of government telegrams, the transmission of news matter, market quotations, and such business as is usually offered to a public telegraph company; that the line of the Company extended from the state line between Rhode Island and Massachusetts to Boston, and to Rockport, Massachusetts; that its line was a link in the system for transmitting cable messages from New York and points west of New York to Europe, and messages from Europe to the United States, to New York and points west of New York, and to Boston and points in Massachusetts; that a message travelling east from Chicago for
42 Liverpool would probably pass through New York and over this line; that about 600,000 cable messages pass over this line in a year; that a break in the line of this Company would deprive the cable system of a very important part of its facilities.

On cross examination the witness testified that he did not know of his own knowledge whether the Company had a permit to go through the Town because the line was built before he was connected with the Company; that the minute book of the Company did not contain any record of the location in Essex except a record in 1885, of a report by the President that since the organization of the Company five wires have been strung east from Boston to Rockport, Massachusetts; that the Company's application under the name of the New England Telegraph Company of New York for a permit in the year 1905, must have been merely a slip of the pen as the New England Telegraph Company of New York had never had anything to do with this line so far as he was aware, nor ownership in it, and that the only incorporation of the Company was the one of April 7, 1884.

On re-direct examination the witness testified that the minute book did not contain minutes of permits of any but very few towns as it did not appear to have been the custom to make a record in the minutes of the transactions of directors and stockholders of any of the permits that were obtained through the towns.

EDWARD B. PILLSBURY, superintendent of the Company,
43 testified that through an error in dictating the application to the authorities of the town, the application was in the name of the New England Telegraph Company of New York, but in fact was for the Company; that he had no connection with the New England Telegraph Company of New York either as an officer or a stockholder, or in any other way; that the application for a location referred to was made with reference to the line of telegraph which then existed and now exists in the Town of Essex; that about half of the messages sent from Chicago to Liverpool handled by our system would go over this line and about one-half of the messages from points in Europe to the United States over the Commercial Cable system would go over this line; that in the year 1905, the Company undertook to make some new construction, repair or relocation or re-setting of its line in the Town of Essex; that the line was weakened very much and unreliable for traffic as well as unsafe for the travelling public; that since the original construction the local conditions had changed by the growing up of trees, the construction of new driveways and new buildings, so that the line as originally constructed did not fit the new conditions and re-construction was therefore necessary; that a large number of the poles were very badly decayed below the ground; that many of the guys were almost rusted off and many of them had been cut off by the abutters; that there was cross arm construction for the whole distance through the Town of Essex; that some of the poles reached the unusual height of 75 feet in order to clear trees, and extensions had been put on a number of other poles when the company was unable to obtain longer poles; that such a method of con-
44 struction was a source of weakness and unsafety; that the 75 foot poles were always a source of danger; that he made an application to the town for permission to re-locate and re-build the line through the town; that he did not know whether his men actually started in to make any changes before he made such application; that the application signed "New England Telegraph Company of New York by E. B. Pillsbury, Superintendent, for a location in the Town of Essex" which was introduced in evidence and marked "Complainant's Exhibit 3" and a copy of which is hereto attached, was the original application he had made for the re-location he had spoken of; that the asking in this application for a location in behalf of the New England Telegraph Company of New York was an error of nomenclature: that the line he had in mind was the Company's line, running through the Town of Essex; that he had no intention of getting any new location for any other company than the Company, the application stating that the new poles were to occupy practically the positions occupied by the old poles; that a relocation was what was really desired of the Company's line; that after this application was made he had a talk in his own office with two of the selectmen and their counsel, namely, Mr. Cogswell, Mr. Kimball and Mr. Richardson; that Mr. Ryan, foreman of the construction department of the Company and Mr. Wardner, its counsel, were also present; that this talk took place in the summer; that

counsel for the selectmen stated that the board desired to have the poles of the Company taken entirely out of the town; that the board would not grant the company's petition and that if the Com-
45 pany undertook to do any construction work on the line, the town would prevent it if necessary by force; that counsel for the board stated that the fact that the petition appeared to be for the New England Telegraph Company of New York would not be a matter of contest; that Mr. Wardner asked one of the selectmen in regard to the point that a location rather than a relocation was asked for in the petition and that the reply was that the town would grant neither a location nor a relocation; that one of the selectmen said that it was not any question of technicalities, but a question of the right of the company to be in the town at all; that one of the selectmen stated that they were not going to have the Company in the town at all; that he was under the impression that the Company had done some construction and made some changes since the conference; that the line was then in good condition; that it had not been relocated in any part; that poles had been renewed and wherever it was found necessary new wire was put in and also new cross arms; that before the application was made the line was so weak that a violent wind storm was liable to blow it over, or the giving way of a guy on a corner pole would allow the line to fall into the street and this did actually happen just prior to the application for permission to rebuild, resulting in the blocking of the street and stopping the trolley cars after dark; that if telegraph wires became crossed with trolley wires, there is great danger to life and property besides interrupting the telegraph company's traffic; that the effects of crossing wires may be felt for hundreds of miles; that fires may be set and have been set from this cause.

On cross examination the witness testified that what he
46 really meant to sign was "The New England Telegraph Company of Massachusetts"; that he had claimed all along that the Company had a location in the streets. Asked how it happened that he did not say "relocation," he replied that he did not attach any importance to it; that he did not think it was of consequence; that there was no permit to locate the poles in the town in the Company's Boston office; that he had caused search to be made in New York and was told there was no permit in the book where the permits are ordinarily kept for Massachusetts towns; that his reasons for making the application to the town were to preserve the integrity of the line, that is, to make it stronger physically, to secure the co-operation of the town authorities in such work as might be necessary, and to complete his office records of town permits in Massachusetts; that the reason for any of the records being in New York was that New York is the headquarters of the executive offices of the entire system, as previously explained; that he had made another application for a permit to locate or relocate a line in the town of Essex before the application covered by Exhibit 3 was made; that the conference referred to with the selectmen and counsel in the witness's office took place, he thought, in August; that the application referred to in Exhibit 3 was made on February 3, 1902;

that the other application he referred to was not made before this one, but on June 1, 1905, and it was in the name of the New England Telegraph Company of New York; that it was apparently copied from Exhibit 3, merely changing the dates; that the application of 1905 was the only one the Town of Essex had ever refused to the witness in writing; that he understood the refusal of
47 the town dated July 11, 1905, referred to New England Telegraph Company of Massachusetts; that since 1899 he had received no formal communication from the town excepting the communication dated July 11, 1905; that since 1899, acting for the New England Telegraph Company of Massachusetts, he had made the two applications referred to, both of which were in error signed in the name of the New York corporation.

"Q. Has the New England Telegraph Company of Massachusetts ever made an application for a permit to locate or relocate its line through the town of Essex since 1899? Do you understand that question?

A. Not entirely; do you mean written or verbal application?

Q. In writing.

A. Not to my knowledge.

Q. Then the town of Essex has never refused the New England Telegraph Company of Massachusetts a permit to locate or relocate its lines through the town of Essex has it?

A. Do you mean written or oral?

Q. I said in writing.

A. I have never received one which specifically stated New England Telegraph Company of Massachusetts."

On re-direct examination the witness testified that he recognized Exhibit 3 not as the application which was made to the town of Essex and which was refused and which was the subject of the litigation, but as being a prior application referred to in his testimony; that the application of which Exhibit 3 was a copy was sent in to the town, but he received no notice of action by the board of selectmen; that the paper introduced in evidence as complainant's Exhibit 4 is a copy of Defendant's Exhibit I, which is hereto attached, and is the application which he made to the selectmen of Essex in the spring or early summer of 1905; that a letter dated June 22, 1905, from the Town Clerk of Essex addressed to the witness, introduced in evidence as complainant's Exhibit 5, a copy of which is hereto attached, was undoubtedly received by him; that a letter addressed to the New England Telegraph Company, 84 State Street, Boston, dated July 11, 1905, from Aaron Cogswell, Chairman, introduced in evidence as complainant's Exhibit 6, a copy of which is hereto attached, was received by him; that the application dated June 1st was made by the Company which owned the property.

48 GEORGE F. BARTLETT testified that he was employed by the Company in 1884 in the capacity of constructor, assistant superintendent and right of way man, that is, a party attending to the soliciting of rights of way through towns; that he attended to

procuring rights of way through towns for the Company; that he applied to the town of Essex for the right of way; that the application was in writing; that he last saw it in the hands of Mr. Bartlett who was chairman of the selectmen of Essex; that he prepared the application himself; that it was written as any prayer or petition for right of way, but it contained the location of streets through which the line was to pass; that it was presented somewhere in June or July, 1884, before any line was constructed; that it was presented at Mr. Bartlett's house; that he took dinner with Mr. Bartlett and in the afternoon they had the two selectmen confer with Mr. Bartlett and the witness; that the two selectmen came up to the house; that they talked the matter over and Mr. Bartlett told the witness that the petition would be granted; that the line through the town of Essex was the line of the Company.

On cross examination the witness testified that he left the application with Mr. Bartlett, chairman of the board of selectmen to be recorded; that he didn't know whether Mr. Bartlett sent the permit to Mr. Robeson, the superintendent of the Company; that he didn't see the permit signed by the selectmen and had no personal knowledge that it was ever signed.

On re-direct examination he testified that no one made any objection to the building of the line through the town of Essex so far as he knew.

49 JOSEPH ATCHISON testified that in May, 1884, he was inspector on the line of the Company that was being built until the line was completed in the fall or winter of that year, and then was employed as superintendent; that he remained superintendent until succeeded by Mr. Pillsbury, about 1898 or 1899; that he first heard of there being any question as to whether the Company had a right of way through the town six or seven years after the Company began to operate in 1885, that is, somewhere after 1891 or 1892, along there; that thereupon he sent a man named P. S. Fisher, who was his foreman, but who is dead, down to investigate and Fisher reported that the pages of the records had been destroyed or torn and for that reason the witness could not get the information he wanted; that when the electric railway was built through Essex he received a notice from the selectmen to move the poles out of the way of the electric road and permission was asked to re-locate the line; that the selectmen would not give the Company anything in writing, but gave it a verbal permit in the presence of two witnesses, to wit, Thomas McCaffrey, the foreman, and another man whose name the witness did not remember; that the line was relocated in consequence of that permission and McCaffrey did the work; that when the line was constructed he heard no objections from anyone; that he heard no objections for six or seven years after the line was constructed.

On cross examination he testified that the investigation when it was reported that a leaf had been torn out of the book, took place six or eight years prior to the time of the witness's testifying; that
50 the man he sent down to look over the records to find the permit was merely under the supposition that the permit was

on a leaf that was missing in one of the record books; that he had no personal knowledge of the Company's having had a permit to relocate its line when the electric railroad went through Essex only what was reported to him, that is, that the selectmen orally refused to grant a permit in writing but had given their oral consent to the Company's having a permit.

It is admitted that the Farmers Loan and Trust Company of New York owns the entire capital stock as of record on the books of the Company.

THOMAS MCCAFFREY testified that he went to work for the Company in 1885 and remained in their employ ten years as operator and lineman in charge of a section of the lines from Lynnfield to Rockport; that when he went into the Company's employ there were 200 poles in the town; that there were no anchor guys; that down to the time the electric railroad came into the town he put about ten new poles into the line and added five new guys, some of which were anchor guys and some of which were fastened to trees or other poles; that when he went to work for the Company there were five wires, four of them strung on a cross bar and one on the pole bracket under the arm; that later one wire was added; that a new cross arm was put up and the new wire and the one that had been on the bracket was strung on the cross arm; that when the electric railroad came through the town, he went over the route with Mr. Kimball, one of the selectmen, and had him point out where the witness might move the poles that were in the way of the Railway track; that Mr.
51 Kimball pointed out to him where to set the poles; that he did not think he made any effort to get a permit for this relocation in writing from the selectmen; that he declined to move any poles until the selectmen would show him where he could put them; that he then moved about half the poles in the town; that he had to put in side arm construction, especially at Essex Falls, on account of some large trees that were too high to get over and not room enough between the trees and the railroad track for the line; that the side arms were put on to extend and carry the telegraph wires above the trolley wires; that the shortest of the new poles he put in was 65 feet and the longest 69; that he had to put in such high poles to carry the wires above the trees; that the shorter poles are very much stronger and safer, but the big poles were used to avoid injuring the trees.

On cross examination the witness testified that the object of moving the poles was to give clearance for the cars to run on the tracks; that the object of moving the poles was principally on account of their being in the way of the running of the cars of the electric road; that the track was too near the poles; that he had heard that the selectmen of the town denied that the Company had a location in the streets of the Town.

ELIJAH HEBB testified that he was foreman for the Company and in its employ, and had been for eighteen years as lineman and foreman, most of the time foreman; that he repaired the line in the town of Essex in 1901 and 1902; that he first saw the line in 1885 and from time to time after that down to 1902; that he strung an
52 additional wire, making seven in all, on the line in 1897; that there were about 200 poles in the line; that when he first saw the line the construction was poor—poles and wires through there—no line—don't call it a telegraph line—every old way—no proper construction—the poles moved back and others set out and as a line it was no good; that the poles averaged from 30 to 65 feet—he should say on an average 35 feet—every fifth pole guyed—averaged more than that probably; that this was always the condition of the line while he knew it; that in 1902, he started to rebuild the line from Rockport; that he got up into Essex to a point near Lufkin Street; that he finished up his work for that season and his intention was to get a new right of way, trying to cut across private property, that he finished temporary repairs right through to Hamilton; put up perhaps half a dozen new poles through the town and tried to buy a right of way and could not do it and got the selectmen out and went over the route and made a temporary survey and temporary locations to rebuild. This was in February, 1902; that he presented the application (Exhibit 3) to the town clerk; that he saw all three selectmen about it; that he took them over the route in a carriage and told them that he wanted a re-location of the poles all through the town; that they claimed that the Company did not have any permit or franchise through there and he presented the petition; that Mr. Story, one of the selectmen, said he should not sign it and the other two did not say whether they should or would not; that he, the witness, went away after that and did not come back; that
53 the other selectmen were present when Mr. Story said he would not sign; that this took place in regular town meeting on Monday night; that the petition was presented at that meeting and read in the witness's presence; that the Town Clerk presented it to the board; that there was discussion and the petition was laid on the table for further consideration at June meeting; that Mr. Story made a claim we had a line of poles through there and that was enough; that before he presented the petition he went over the route with all the selectmen together and pointed out where he wanted to be located and they agreed if he could get located that would be the proper place; that as to the need of repairing the line, relocating or resetting the poles or restringing the wires, it was needed; that the poles were old and worn out, decayed at the ground, decayed at the top; cross arms worn out; guys rusted and worn out; could not repair unless put in new poles; the poles were not set in lines either on curves or on straight; the poles were set in two or three feet where the bank was dug away and shoved back from the track and filled in around and did not pay any attention to lining them up; put one pole two feet and another back a foot; one top to one way and one another, and the poles were decayed so at the top you could not do anything with them, and the only proper way to

do was putting in new poles and wanted to get them in line; that the line was crooked and the road was crooked and the line had to be straightened and relocated and even if that was not done, the line was in a very bad state of repair and needed resetting.

The witness then stated in detail the specific places in the line which were in bad condition and needed repairs, re-location, re-setting and restringing.

54 The witness further testified that the line was safe *in* a nice mild day, but for any severe storm, or in a common wind storm it was dangerous. Nothing there to hold it up; that it was liable to fall down; that the poles were decayed and everything was weak and worn out and that for a large part of the distance through Essex it was in close proximity to a trolley wire so that if the wires crossed with the trolley wire, fires would probably be set; that it was dangerous to an operator, to a lineman, to public travel, to anybody; lines coming down; lots of people get killed with wire; horses get killed; a man working on a pole might get killed; don't know where it is coming from.

On cross examination the witness testified that the meeting of the board of selectmen at which he presented the petition referred to was held on the Monday night preceding the 22nd of February, 1902; that it was a meeting of the board of selectmen, not a town meeting; that Mr. Goodhue, Mr. Cogswell and Mr. Story and the town clerk were present; that he might be mistaken about Mr. Story; that the man he referred to was a ship carpenter; tall man who lived up towards Hamilton, and that if this was Mr. Goodhue, it was the man that said he would not grant the petition; that they talked the matter over and laid the petition on the table for further consideration, and as far as he knew they never took any action; that he supposed the company had a right to be in the streets, but as far as he was concerned he did not know whether they had any rights or not; that he did not know the town had denied the company the right to come there, but supposed the company had a right of way there.

55 WILLIAM RYAN testified that he was foreman of construction for the New England Telegraph Company of Massachusetts and had been for sixteen years; that there was no other feasible route over public highways through the Town of Essex going directly towards Gloucester than that which the line occupied; that he first went over the line in 1885 and had known it off and on since; that he was connected with the maintenance department and that it was up to that department to make the line safe from Boston to the point where Mr. Hebb left off; that the witness rebuilt and relocated the line in the City of Everett because the poles were worn out; that he repaired it through Malden, Saugus and Danvers; that in Essex he found it in the same condition as in Everett; that the line was beyond repair; that he came back and reported it was waste of money to spend on it as repairs as it needed new poles and a great number of poles re-located; that an effort was then made to obtain a private right of way, but a private right of way was found not to be obtain-

able; that in 1903 and 1904 he laid out the material for a new line in Essex, Hamilton and Wenham; that when he started to rebuild in Essex he consulted the selectmen regarding relocating the poles and was advised by them to bring a petition; that he consulted with Mr. Pillsbury and received from the latter the petition introduced in evidence as Exhibit 1 and delivered it to one of the selectmen;

56 that each abutter was notified and a date set for a hearing on the petition; that the witness attended the hearing; that the sense of the meeting was that the selectmen should not grant the petition; that the people knew what the petition meant, what the Company meant to ask for and why the petition was presented; that he saw complainant's Exhibit 6 in Mr. Pillsbury's office the day after he received it; that he thought June 30, 1905, was the date of the meeting referred to; that between June 30th and July 11th he had several interviews with the selectmen; that Mr. Cogswell said there was a general feeling of the town against the Company and they did not see their way clear to grant the petition; that outside of the board of selectmen and their attorney, he didn't see anybody that objected to the company's having its poles and wires in the town when he met them individually; that they never said anything to him about it; that he called on the chairman of the board a second time and interviewed selectman MacKenzie, who said personally he had no objection to the Company's having poles and wires in the town, but the rest of the board was against it; that he, the witness, asked the chairman of the board if he had any objection to the Company's going ahead and repairing the line as it stood, replacing the poles, and new poles, and he said that he had; that if the Company made any attempt to do any work in the town, the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested; that at the meeting held on the petition he recollected that either the chairman of the board or Mr. Richardson, counsel for the town, asked the witness if this was a foreign corporation, and also what was meant

57 by asking for a location instead of relocation of the poles, and that the witness stated to the board and to the assembly that those were clerical errors; that perhaps he was responsible for them in not giving the proper information to Mr. Pillsbury who had written it, and he requested that the application be returned to him so he could have corrections made and was told that that was not necessary; that he took the responsibility of the error of having the word location instead of relocation in the petition and explained to the best of his ability the reason that the Company had a petition and why it petitioned and where the poles stood and where the Company wanted them and why it wanted them changed; that there is no question the selectmen understood what the Company wanted, as he had explained to each one individually; that at the conference held in Mr. Pillsbury's office at which Mr. Richardson, Mr. Cogswell, Mr. MacKenzie, Mr. Kimball, Mr. Pillsbury, Mr. Wardner and the witness were present, in August, 1905, Mr. Richardson told Mr. Pillsbury that they did not propose to have any poles of the New England Telegraph Company in the town on any

street if they could prevent it, and that Mr. Kimball spoke up after Mr. Richardson finished and said there were not any streets they wanted the Company to use in the Town of Essex; that he heard Mr. Richardson ask Mr. Pillsbury if he had any papers to show the Company had permission to set poles in the town; that in answer to this question Mr. Pillsbury stated that although the papers could not be found, he had always supposed that they had; that the witness or Mr. Pillsbury then claimed that aside from the town location the Company had a federal right to build on post roads; that to sum up the whole conference, it was settled this way: That the Company could not set any poles in the Town of Essex unless the court said so; that he remembered Mr. Wardner's asking one
58 of the selectmen about the fact that the word location instead of relocation was used and the name "Telegraph Company of New York" instead of "Telegraph Company of Massachusetts" and the reply was that it did not make any difference what Company we was, they should not grant to any Company; that is what Mr. Richardson said and the witness thought Mr. Kimball; that after this conference he talked with Mr. Cogswell and told him that Mr. MacKenzie had consented to go and show the witness where to put the poles if Mr. Cogswell would do so and that Mr. Cogswell refused; that this was a few days after the injunction had been granted; that Mr. Kimball when spoken to about the matter said "We haven't got anything to do with it now" and Mr. MacKenzie didn't want to take the responsibility unless the other selectmen would consent to go and the other selectmen would not, so the Company started to repair the line and consulted the abutters principally and placed the poles as far as it could agreeably to the wishes of the abutters; that prior to the granting of the injunction the line was worn-out; several of the poles were rotted off entirely at the bottom near the ground; a large number of them were decayed at the tops. The construction generally was lower than the standard of the Company; that at the time the trolley line was built a number of the poles were moved nearer the trees, which made it necessary to side-arm, as it is called; that is, arms projected from the pole, rather than to put on the poles square, which is considered weak construction; that he found the line also had been crowded a good deal by shade trees, some having been planted since the line was
59 built and grown up directly under the line and annoying the owners of adjoining property when the wires were cleared; that he had promised to relocate the poles as soon as it was practicable, provided the selectmen would allow it and the conditions required it. The witness then stated in detail and specifically the need of repairing, resetting, relocating and restringing the wires in the various portions of the line and what the Company had done since the granting of the injunction to put the line in a proper condition.

On cross examination the witness testified that at the meeting held on the petition he asked the selectmen if they wished him to bring the application back to Mr. Pillsbury. They said that it did not make any difference—did not matter. They would not con-

sider any application; that he did not intend to say in his testimony as to what took place after the injunction that he ever got permission to remove poles and change them to another place from the selectmen; that what he did mean was that he located some of the poles in accordance with the wishes of the abutters; that he attended the hearing given by the selectmen on June 30, 1905; that the chairman stated fully and fairly the object of the meeting, which lasted nearly an hour; that there was ample opportunity for everybody who wished to express their sentiments; that it was the unanimous vote of those present that the selectmen should not grant the petition.

On re-direct examination the witness testified that what took place at the meeting was that the chairman made no remarks, but put the question he was asked to by somebody on the floor. They were asked to hold up their hands, those that thought the petition
60 should not be granted and a large number held their hands up. The witness did not know as all, but the majority—but he thought it was unanimous; that this was after Mr. Richardson's speech.

On re-cross examination he testified that at the conference in Mr. Pillsbury's office when Mr. Pillsbury was asked either by Mr. Richardson or one of the selectmen why he did not go down the railroad track where the Western Union Telegraph poles go and thus avoid going through the streets of the town nearly the whole length of the town, Mr. Pillsbury replied that it was impossible for the Postal or New England Telegraph Companies to use the property of the Boston & Maine as they had a contract with the Western Union which gave the Western Union control.

HENRY H. HAZELTON testified that in 1884 he was employed by the Company as foreman building the line from Boston to the junction of the Gloucester and Rockport Line; that he heard no objections from anyone in the town of Essex when he was building the line; that there was no other feasible route through the Town of Essex from the Hamilton Line, going to Gloucester, on the public highways than the one adopted; that in building the line no guys at all were used; that four wires were strung and the poles were from 30 to 35 feet high; that it was all cross bar construction and no bracket; that guys are regarded as necessary construction
61 today. All heavy lines use guys; that he left the Company's employ in 1884 after the line was built.

It is agreed that the Company and the New England Telegraph Company of New York have duly accepted the provisions of the Telegraph Act of Congress.

EPES SARGENT testified that he was Town Clerk of the Town and had been such continuously since 1896; that he was present at the hearing that was held in Essex June 30, 1905, on the petition of the New England Telegraph Company of New York; that he notified all the abutters on the line, very nearly 135, of the hearing; that

defendant's Exhibit A, a copy of which is hereto attached, was a copy of said notice which was dated June 26, 1905; that he received several letters, copies of which were introduced in evidence and marked respectively Defendant's Exhibits "E," "F" and "G," copies of which are hereto attached, from non-resident abutters, saying that they had received the notice and what they wished done; that the meeting was held on June 30, 1905, and Mr. Cogswell first read the petition and in his remarks said that he referred to the big poles—tall poles; that the question was whether the Town should grant a permit or location; that most of the answers were "No"; that A. D. Story said "No new poles—old ones removed"; that he had charge of all town records except the assessors' books and the records
62 kept by the selectment of their doings which they kept in a small book of their own; that he had examined the records from 1861 down to 1902, and had not been able to find any record of a location being granted to the New England Telegraph Company of Massachusetts or the New England Telegraph Company of New York; that he had examined the records from 1861 to 1902, to see if there had been any leaves or any leaf torn out of the records and found no leaves torn out—no mutilation of the record; that he had looked over the record for the year 1884 the previous Sunday and found everything straight; found it intact; that he was acquainted with Daniel W. Bartlett, deceased, who was chairman of the selectmen and heard Mr. Bartlett say that the Company had no rights to go through the town. An affidavit of the witness as town clerk was introduced and is hereto attached as Defendant's Exhibit H.

On cross examination the witness testified that he had sent the notice to nine non-residents; that the meeting of June 30, 1905, was called to order by Chairman Cogswell who said in response to some statement from the floor that the petition referred to the big poles; that he did not understand Mr. Cogswell to mean that what was wanted was a new line of telegraph in addition to the poles there, but that Mr. Cogswell wanted to distinguish them from the poles of the other companies, the telephone company and the electric railroad, which were a great deal shorter than the poles of the
63 Company; that he understood Chairman Cogswell wanted to have the meeting understand that the petition referred to the Company that had the big poles there as distinguished from the others; that he understood A. D. Story to refer to the Company that had their poles there; that Mr. Ryan was present at the meeting and said that he thought the use of the name of the Telegraph Company of New York must be a mistake and that he thought that the application asking for a location instead of a relocation was an error too; that Mr. Ryan made it plain to the witness that really what was wanted was a relocation of the poles of the Company that were then there in the town; that the records produced contained all the records relating to the town meeting, but did not contain the records relating to births, marriages and deaths, dog licenses, mortgages and bills of sale and liens; that he had not examined the last named books; that they had rural free delivery in Essex since July, 1905;

that prior to that time the mail came to the Post Office; that the Post Office was on one of the main streets upon which the telegraph line was located; that as a matter of fact the mail was brought in the front door of the Post Office on Main Street upon which the Company's line was located.

64 EVERETT B. JAMES testified that he was a selectman of the town for five years and was on the board the year the electric railway was being built in 1895; that where they had surveyed it would interfere with a few poles and that the orders of the selectmen were to move these poles so that the track could be laid; that neither he nor Mr. Kimball, another selectman, designated to the superintendent who was in charge where those poles should be reset; that they told the superintendent he must move them; they were in the way; that at one time there was a large number of poles moved in the street, but it was not done by their orders; that the few poles above mentioned were all the poles ordered by them to be moved; that the 40 or 50 poles moved by McCaffrey were not moved at that time; that he once asked the Company to move the poles in front of the Town Hall, but they refused to do it; said they could not; that the selectmen in 1895 when requesting the Company to move the poles out of the way of the electric railroad never consented in any way to a resetting of the poles in the street and never designated where the poles should be set; that he had heard Daniel W. Bartlett, former Chairman of the Selectmen, both inside and outside town meetings state that the Cable Company had no permit whatever to locate their poles in this town, by which he meant this line we are now considering—the Company with the tall poles.

On cross-examination he testified that he did not know whether Mr. Kimball pointed out to McCaffrey where he might put his poles; that he, the witness, had been over the line part ways
65 with McCaffrey; that Mr. Kimball went along too; that the purpose of going over the line was to point out to McCaffrey what poles were either in the track or too near the track, and so had got to be removed; that he was not prepared to deny that Mr. McCaffrey moved certain poles; that they knew nothing about it; that all he was prepared to say was that he did not order McCaffrey to remove any poles other than those few he had mentioned.

JOHN B. BARTLETT testified that he was a son of Daniel W. Bartlett who was for a good many years Chairman of the Selectmen of the Town of Essex; that he always told the witness that the Company had no permit and no location and the reason that led up to this was the crookedness; that he used to go riding with his brother through the town; that the poles were set slantways, crisscross, and looked like a drunken man about all the way through Essex. Mr. Bartlett also testified as follows: "And I asked the reason why they should be so and he said they had no location. I says: 'Why did they come through Essex?' He says 'They wanted to go through Manchester but there were so many rich people there that would

fight it that they dumped it on to us'." The witness further testified that there is no mail carried over this road.

On cross examination he testified in regard to the condition of the line that "it was set—first you can stop at, we will say, a mile and a half between the line and the Hamilton line, and they were set like this (indicating); it was laughable." That the line was in a shocking condition; that when it was first put up it was the same; no worse; that he would not say the poles slanted 45 degrees, but the top was out certainly three feet from the bottom; that one setting one way and one another, it would set farther; that every inch you get out of the perpendicular decreases the stability of a pole to a certain extent; that the line was never properly set.

66 There was scarcely 100 feet that was in line ever.

BENJAMIN F. RAYMOND testified that he was Treasurer of the Town of Essex; that the mail was not carried over the roads occupied by the telegraph line from Boston, but came by railroad and was brought up from the depot; that in being brought from the depot it was carried 100 or 200 feet on Main Street on which the telegraph line was located; that it was his impression that at the meeting of June 30, 1905, Mr. Ryan wanted to get permission to repair the poles; that they had no right, no location there and this petition was to get the right for the Company that was then there.

GARDNER BURNHAM testified that he had lived in the Town of Essex all his life; that he remembered Mr. Ryan speaking at the meeting of June 30, 1905; that he remembered of the question being raised about the name of the Company; that he could not recall the conversation, but as he remembered it these different names under which they had corresponded with the town at different times meant the same Company, that is, meant the one with the tall poles.

67 ENOCH B. KIMBALL, testified that he was a selectman of the Town of Essex nine years from 1887; that then there was a break and he was elected to the board again in March, 1902; that he was a selectman in 1895; that when the electric road went through the town it was found in some places that the telegraph company's poles would obstruct the running of the cars because some few of them were in the track and some of them very close to the track; that he told Mr. McCaffrey to put these poles sideways; that both applications of the telegraph company for a location, to wit, the one of February, 1902 (Claimant's Exhibit 3), and the one of June, 1905 (Exhibit I), were brought into the office through Mr. MacKenzie, who was a selectman down to within a year; that there was no action taken on the petition of February, 1902; that on the petition of June, 1905, a hearing was held on June 30th at 8 P. M.; that after the hearing the board voted not to grant the location which was asked for; that the petition which they then acted upon was the petition of June 1, 1905, which was introduced as defendant's Exhibit I, a copy of which is hereto attached; that the record book of the meetings of

the selectmen was in court. The witness thereupon read the record of action on the petition of June, 1905, as follows:

"June 21st called a hearing for the location of poles to New England Telegraph Company, to be held June 30th at eight o'clock P. M.

June 30, 1905, hearing for location of poles and wires to New England Telegraph Company of New York. Full board present.

July 10, 1905, full board present. Voted not to grant a
68 location for poles and wires to New England Telegraph Company of New York."

That he had looked over this book and found on leaves torn out or any mutilation of the record in any way; that this inspection of the record embraced a period from 1861 to the present time; that he did not find any permit for a location of poles in the streets to the New England Telegraph Company of Massachusetts, or the Postal Telegraph Company of the United States of America, or the Bennett & Mackay Cable Company of parts unknown; that the selectmen voted not to grant this petition; that he had never been presented with a petition for a location by the New England Telegraph Company of Massachusetts; that there was an older book than the one produced in court which he had examined thoroughly and found no petition there for a permit by any of the companies that had been named and no leaf torn out; that this was the record of weekly doings previous to his being in office and the other book of weekly doings after he left.

On cross examination he testified that at the meeting of June 30, 1905, Mr. Cogswell explained who the people were and what they wanted; that he referred to them as the Cable Company as going through the Town; in other words, the Company that owned the line that was then there; that he said they wanted a location for poles and wires and license to run it; that he did not understand that they wanted two lines there instead of one; that from what Mr. Cogswell said it was plain that it was the same company that owned the line then there and they wanted a location for that same line;

that he had looked carefully through the records of the select-
69 men's meetings to find out whether there was any grant of a right of way or location to a telegraph company and did not see any to any telegraph company at all except the telephone company; that if the application had been in the name of the New England Telegraph Company of Massachusetts, he did not think the selectmen would have granted it; that he supposed that the same company made the application which was already there. Asked whether he remembered Mr. Wardner's asking the selectmen at the conference at Mr. Pillsbury's office whether it made any difference that the petition used that name, and asked for a location, and asked whether he remembered the reply being made that it did not make any difference, that the object of the town was to discover the right which any telegraph company had to use its streets and if it had a right well and good, and if it did not have a right the town was not going to have any telegraph company there, the witness replied that something like that was said. Asked whether he did not meet Mr.

Ryan shortly after the meeting of June 30, 1905, and whether he did not say to Mr. Ryan that the form of the petition made no difference; that the fact that they asked for a location and the fact that they applied in the name of the Telegraph Company of New York was not of importance, but that the idea was to dispute the right of the telegraph company to be there and that was why they refused the petition, he replied he did not remember of saying it made no difference; he may have said he wanted to raise the question on the right of the company to be there, whatever company it might be that owned those poles and wires.

70 AARON COGSWELL testified that he was chairman of the Board of Selectmen; that he had been a selectman for six years; that he was present when both of the petitions referred to were put in; that in regard to the petition of February 3, 1902, (Complainant's Exhibit 3) that was put in by Mr. Hebb; that there was not any formal meeting or hearing held on this petition, simply an informal talk in the office; that the selectmen rode over the line with Mr. Hebb and wanted them to act on this petition; that the selectmen told him that if they did act on it, he would hear from them; that they never did act on it, nothing formal, just talked it over informally; that in regard to the petition of June 1st, his attention was called to the fact that the Company was digging holes and setting poles down by Charles Foster's at the Falls; that this was before the petition of June 1, 1905, was put in; that he took a team and rode up there and took Mr. Foster with him; that he asked the Company's foreman, Mr. Gould, by what authority he was acting and that Mr. Gould replied that he did not know that he had any right; that he told Mr. Gould to stop right where he was until he got a right and came away and left him; that thereafter the witness received the petition of the New England Telegraph Company of New York, June 1, 1905 (Exhibit I), seeking a location in the Town, and the Selectmen determined to call a hearing for June 30, 1905; that a hearing was called all the abutters having been notified; that at the meeting he first read the petition and after the petition was read somebody asked what company this was; that he read
71 the name of the Company on the petition and said that it was the Company that had the large poles in the town; that after the meeting the selectmen went to their office and voted not to grant the petition, which vote was recorded in the books of the selectmen; that he had examined the records in the selectmen's book thoroughly; that the book was present; that he found no evidence of mutilation or any page or pages missing; that Mr. Ryan, foreman of the Company, came to the selectmen's office one evening and witness asked him "What is the contention of your Company?" and he said "That the records have been mutilated:" that the witness asked him what year it was and he said 1884; that the witness then got the selectmen's book and Mr. Ryan examined it with him and was forced to admit that there was nothing that looked like mutilation; that Defendant's Exhibit I of which Complainant's Exhibit 4 was a copy, was the petition on which the selectmen acted and refused;

that he notified the New England Telegraph Company of New York that their petition of June 1, 1905, had been refused; asked to explain how it happened that his memorandum of action on the petition dated June 1, 1905, was on the petition dated February, 1902, he replied "When I wrote that that evening, being in a little hurry, I did not notice which one I wrote it on. Had both papers there. I wrote it on that one instead of erasing it afterwards out on that one the same evening;" that Daniel W. Bartlett, former selectman, told the witness in the selectman's office one day that the New England Telegraph Company of New York never had a location in the town; that witness asked him if he understood what Company he meant, namely, the Company then in the town, and Bartlett replied "Yes," he knew what was meant.

72 On cross examination the witness testified that he considered the failure to act on the petition of February, 1902, equivalent to a refusal; that he supposed the company that wanted a location was the company already there; that he had every reason to suppose it was the line then in the town; that he inferred from what Mr. Bartlett, the former selectman said, that what he meant to say was that they had definitely acted on a request and had refused it.

On re-direct examination he testified that the selectmen had refused the company which was then in Essex any location.

It is agreed that the New England Telegraph Company of Massachusetts was duly incorporated under the laws of Massachusetts April 7, 1884, with a capital of $30,000, for the purpose of constructing lines of aerial or underground telegraph both within and without the limits of said Commonwealth and the owning of interests in such lines, with the powers, rights and privileges and subject to the limitations, duties and restrictions which by law appertain thereto.

The following Exhibits are to be printed as a part of the record:

Complainant's Exhibits 3, 5, and 6.

Defendant's Exhibits A, C, D, E, F, G, H, I and J.

WILLIAM B. SULLIVAN,
FRANK C. RICHARDSON,
Attorneys for the Defendant.

Agreed to:

G. PHILIP WARDNER,
Attorney for the Plaintiff.

73 COMPLAINANT'S EXHIBIT 3.

The New England Telegraph Company, of New York, respectfully petitions the Honorable Board of Selectmen, of the Town of Essex, Mass., for a location for its poles and wires, and license to maintain the same, in following-named streets and highways of said town, viz:—

From the town line of Hamilton, through Western Avenue, Main Street, and Eastern Avenue to the Gloucester line, the new poles to

occupy practically the positions now occupied by the old poles, and any changes in the present locations to be made under the direction of your Honorable Board.

The Telegraph Company agrees to reserve space for one arm at the top of such of its poles as may be designated by your Honorable Board, for telephone or signal wires owned by the town, and used for municipal purposes only. It is understood that such wires shall be strung and maintained upon the poles by the town, at its own cost, and in such manner as not to interfere with the operation of the wires of the Telegraph Company.

NEW ENGLAND TELEGRAPH COMPANY
OF NEW YORK,
By E. B. PILLSBURY, *Superintendent.*

Dated, Essex, Mass., Feb. 3, 1902.

The above petition is granted.

—— ——,
—— ——,
—— ——,
Selectmen of Essex, Mass.

Dated, Essex, Mass., Feb. —, 1902.

[Endorsed in lead pencil:] Hearing June 30th 1905 at 8 P. M. *1905.* July 10th 1905. Voted not to grant a loeation for poles and wires to the New England Tel. Co.

74 COMPLAINANT'S EXHIBIT 5.

[Town of Essex Seal.]

OFFICE OF TOWN CLERK,
ESSEX, MASS., June 22, 1905.

The New England Telegraph Company of New York, E. B. Pillsbury, Superintendent:

The Selectment of Essex have set the date for a hearing on your petition of June 1st, 1905, for June 30th, 1905, (Friday) at 8 o'clock in the evening.

Please inform me if you receive this notice
And oblige

EPES SARGENT,
Town Clerk, Essex, Mass.

COMPLAINANT'S EXHIBIT 6.

[Town of Essex Seal.]

OFFICE OF SELECTMEN,
ESSEX, MASS., Jul- 11, 1905.

New England Telegraph Co., #84 State St., Boston, Mass.:

At a meeting of the board of Selectment of Essex, held July 10th, 1905, it was voted not to grant the New England Telegraph Co. a location for its poles and wires in this town.

AARON COGSWELL, *Chairman.*

75 DEFENDANT'S EXHIBIT A.

Notice.

To ——:

You are hereby notified that a public hearing will be held at the Town Hall at 8 o'clock P. M., on the 30th day of June. 1905 upon the petition dated June 1, 1905 of The New England Telegraph Company of New York to the municipal officers of the town of Essex for permission to locate and erect a line of poles in the ways or parts of ways designated in said petition, along which designated route of line you are an owner of real estate, as determined by the last preceding assessment for taxation.

EPES SARGENT,
Town Clerk.

Dated June 26, 1905.

(Endorsement:) 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913. Filed in Clerk's Office.

76 DEFENDANT'S EXHIBIT C.

Postal Telegraph-Cable Company.

Office of the Superintendent, First District, Eastern Division, India Building, 84 State Street.

E. B. Pillsbury, Superintendent.

BOSTON, MASS., June 23, 1905.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

DEAR SIR: On behalf of the New England Telegraph Company of New York, I acknowledge receipt of your letter of the 22d inst., giving notice of hearing on petition of that company for relocation of its poles through your town.

Yours truly,

E. B. PILLSBURY,
Superintendent.

[Endorsed:] 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913. Filed in Clerk's Office.

Superintendent's Office,
84 State Street,
Boston.

Mr. Epes Sargent,
Town Clerk.
Essex, Mass.

Cancelled
2¢ Stamp.

[Post-Office Cancellation Stamp:] Boston Mass. Jun- 23 8—P. M. 1905.

77 DEFENDANT'S EXHIBIT D.

[Town of Essex Seal.]

Office of the Town Clerk.

ESSEX, MASS., June 22, 1905.

The New England Telegraph Company of New York:

The Selectmen of Essex, Mass., have granted a hearing on the petition of yours (dated June 1, 1905) at the town hall Essex Friday evening June 30 1905 at 8 o'clock.

Please notify me if you receive this notice.

And oblige

EPES SARGENT,
Essex, Mass., Town Clerk.

[Endorsed on Envelope:] 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

Return in five days to
Town Clerk, Essex, Mass.

Cancelled
2¢ Stamp.

The New England Telegraph Company of New York,
New York City.

[Post-Office Cancellation Stamp:] Essex, June 23, 7 A. M., 1905, Mass.

[Stamped on face of envelope:] Returned to sender cannot be found by N. Y. P. O. Jun- 30 1905. Do not post again in this envelope or wrapper. Not in directory No. 4. 1 D.—N. Y. P. O.

[Reverse side of Envelope:]

[Post-Office Cancellation Stamp:] New York, N. Y., Jun- 25, 1 P. M., 1905.

Essex, Mass., Jul- 1, 9 A. M., 1905. Rec'd New York, N. Y., Jun- 23, 5 P. M., 1905.

[Stamped on reverse side of envelope:] Rec'd Gen. Del. N. Y. P. O. Jun- 25, 6 P. M.

78 DEFENDANT'S EXHIBIT E.

GLOUCESTER, April 12, 1905.

To Essex Town Clerk & all whom it may concern:

I have received notice from Essex Town Clerk of a hearing on the erection of Telephone and Telegraph Poles, near my new property there. I cannot be present at the hearing, but wish you to say, I

shall object to any Poles near the house, or on my land in any case. I wish you to take due notice.

CHARLES E. PARKHURST.

My name on your Tax list should be

CHARLES E. PARKHURST.

(Endorsement on Envelope:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

After 5 days, return to
C. Parkhurst & Son,
Gloucester, Mass.

Cancelled
2¢ Stamp.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

[Post-Office Cancellation Stamp:] Gloucester, Mass., Apr. 12, 6 P. M., 1905.

79 DEFENDANT'S EXHIBIT F.

Boston & Maine Railroad,
Eastern Division, Superintendent's Office.

Winslow T. Perkins, Superintendent.

L. BOSTON, June 26th, 1905.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

DEAR SIR: Your notice of June 26th, of a hearing at the town hall, 8.00 o'clock June 30th, in regard to the N. E. T. Co. of New York desiring to erect poles, etc., please advise if this is to be on our right of way and if so can you kindly send me a little sketch of the same?

Yours truly,

W. T. PERKINS,
Superintendent.

Boston & Maine Railroad,
Eastern Division, Superintendent's Office.

Winslow T. Perkins, Superintendent.

L. BOSTON, June 29th, 1905.

Mr. Epes Sargent, Town Clerk, Essex.

DEAR SIR: Your favor of the 28th inst. is at hand. As I understand it these poles are not located on the Boston & Maine Railroad right of way anywheres. Am I correct?

Yours truly,

W. T. PERKINS,
Superintendent.

(Endorsement on Envelope:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

Cancelled
2¢ Stamp.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

(Ans. June 28, 1905. Copy inclosed.)

[Post-Office Cancellation Stamp:] Boston Jun- 26, 4.30 P. —, 1905, Mass.

80 DEFENDANT'S EXHIBIT G.

F. C. Norton,
Choice Family Groceries,
Agent for the Celebrated Bath Creamery and "White Sponge" Flour.

HAMILTON, MASS., June 28, 1905.

Hon. Board of Selectmen.

GENTLEMEN: I received your notice in regard to erecting poles for the New England Tel. Co. I should feel very bad to have any more poles put up. I should think you would try & make them go on the track same as they do here. If I could come to your meeting I should surely vote against it. I hope the people of your town will do the same.

Yours respectfully,

F. C. NORTON.

(Endorsement on Envelope:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

If not called for in five days return to
F. C. Norton, Hamilton, Mass.

Cancelled
2¢ Stamp.

Mr. Epes Sargent, Essex, Mass.

"Town Clerk."

[Post-Office Cancellation Stamp:] Hamilton, Jun- 28, 6 P. M., 1905, Mass.

81 DEFENDANT'S EXHIBIT H.

BOSTON, May 16, 1906.

I, Epes Sargent, Town Clerk of Essex, County of Essex, and Commonwealth of Massachusetts, do hereby certify, that I have the Records of the town of Essex, in my keeping, and find no leaf or leaves

torn out, no erasures made, and no records of any transactions with the New England Telegraph Company, of Massachusetts.

I have produced for examination the records covering the period of years from 1861 to 1892 for use at a hearing to take testimony in the case of the New England Telegraph Company of Mass. against the town of Essex held May 1906 (beginning on the 10th) in the Federal Building, Boston, Mass.

This does not include records kept by the Selectmen of the town of Essex.

EPES SARGENT,
Town Clerk of Essex.

May 16, 1906.

ESSEX, *ss:*

Then personally appeared the above named Epes Sargent and made oath that the statement subscribed by him is true.

Before me,

FRANK C. RICHARDSON,
Justice of the Peace.

(Endorsement:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

82 DEFENDANT'S EXHIBIT I.

The New England Telegraph Company, of New York, respectfully petition- the Honorable Board of Selectmen, of the Town of Essex, Mass., for a location for its poles and wires, and license to maintain the same in the following-named streets and highways of said town, viz:—

From the town line of Hamilton, through Western Avenue, Main Street, and Eastern Avenue to the Gloucester line; the new poles to occupy practically the positions now occupied by the old poles, and any changes in the present locations to be made under the direction of your Honorable Baord.

NEW ENGLAND TELEGRAPH COMPANY
OF NEW YORK,
By E. B. PILLSBURY, *Superintendent.*

Dated, Essex, Mass., June 1, 1905.

The above petition is granted.

——— ———,
——— ———,
——— ———,
Selectmen of Essex, Mass.

Dated, Essex, Mass., June, 1905.

[Endorsed in lead pencil:] Hearing June 30th, 1905. Voted not to grant the above petition July 10th, 1905.

(Endorsement:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913. Filed in Clerk's Office.

83 DEFENDANT'S EXHIBIT J.

BOSTON, MASS, May 11, 1906.

We, the undersigned, Selectmen of the town of Essex, duly and legally elected and qualified at the Annual Meeting, held March 5th, 1906, do hereby certify that we are custodians of the two books of records submitted for examination at a hearing held at the Federal Building, Boston, on May 11, 1906. That we have examined them and find no leaf or leaves torn or in any way mutilated in the books; that we find no records in the year 1884 or in the year 1902 relating to any petition of the New England Telegraph Company, or any Telegraph Company except the following records on the following dates:

June 21st, 1905.

Special Meeting.
Full board present.
Called a hearing for location of poles to the New England Telegraph Co. to be held June 30th at 8 o'clock P. M.

June 30th, 1905.

Hearing for a location of poles and wires to the New England Telegraph Co. of N. Y.

July 10th, 1905.

Full board present.
Voted not to grant a location for poles and wires to the New England Telegraph Co. of N. Y.

These two books are all the books of record in the Office of the Town of Essex kept by the Selectmen since 1861.

The Town Clerk in another affidavit has covered the record book of the town kept by himself and produced said book for examination at this hearing, viz: in case of New England Telegraph Company of Mass. vs. Town of Essex held to take testimony in said case May 11, 1906.

AARON COGSWELL,
ENOCH B. KIMBALL,
DAVID E. MEARS,
Selectmen of Essex.

ESSEX, *ss:*

May 16, 1906.

Then personally appeared the above named Aaron Cogswell, Enoch B. Kimball, and David E. Mears, and made oath that this statement subscribed by them is true.

FRANK C. RICHARDSON,
Justice of the Peace.

84 (Endorsement:) 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913 Filed in Clerk's Office.

85 *Præcipe.*

(Filed January 14, 1914.)

The following are the portions of the record that the Town of Essex suggests be incorporated into the Transcript on Appeal to the United States Supreme Court:

Bill of Complaint;
Recital of Motion for Preliminary Injunction;
Motion to Amend Bill of Complaint;
Order on Motion for Temporary Injunction;
Answer of Defendant;
Cross-Bill of Defendant, Town of Essex;
Recital of Filing of Replications;
Answer to Cross-Bill;
Agreement as to Facts;
Statement of Testimony in Condensed Form with Exhibits Attached, as filed and agreed to December 22, 1913;
Final Decree;
Opinion of the Court, August 14, 1913;
Petition for Appeal;
Assignment of Errors;
Waiver of Appeal Bonds;
Order Allowing Appeal;
Citation;
Præcipe.

TOWN OF ESSEX,
By WILLIAM B. SULLIVAN,
FRANK C. RICHARDSON, *Its Attorneys.*
NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS,
By G. PHILIP WARDNER, *Its Attorney.*

86 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the New England Telegraph Company of Massachusetts, a citizen of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the* twenty sixth day of November next, pursuant to an Appeal duly obtained from a decree of the† District Court of the United States for the District of Massachusetts wherein the Town of Essex, a citizen of the Commonwealth of Massachusetts and a resi-

dent therein, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Circuit Judge duly assigned to hold said *the* District Court of the United States for the District of Massachusetts this twenty seventh day of October, in the year of our Lord one thousand nine hundred and thirteen.

FREDERIC DODGE,
U. S. District Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

87 *Acknowledgment of Service on Citation on Appeal.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

November 4, 1913.

I acknowledge service of the within citation.

G. PHILIP WARDNER,
Attorney for New England Telegraph Co.

88 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in said District Court, in the case in equity entitled, No. 32, (No. 198, C. C.) the New England Telegraph Company of Massachusetts, Complainant, v. Town of Essex, Defendant, in said District Court determined, the Opinion of the Court of August 14, 1913, the Petition for Appeal and Supersedeas, the Assignment of Errors, the Waiver of Appeal Bonds, the Order Allowing Appeal, the Condensed Statement of Evidence with Exhibits Attached, Præcipe, and also the original Citation, issued upon the appeal of the defendant in said case, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this fourteenth day of January, A. D. 1914.

[Seal of the District Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 24,021. Massachusetts D. C. U. S. Term No. 340. Town of Essex, appellant, vs. New England Telegraph Company of Massachusetts. Filed January 16th, 1914. File No. 24,021.

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

Appeal from the District Court of the United States for the District of Massachusetts.

BRIEF FOR THE TOWN OF ESSEX.

WILLIAM G. THOMPSON,
GEORGE E. MEARS,
Counsel for the Town of Essex.

BOSTON
PRESS OF GEO. H. ELLIS CO.
1915

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE TOWN OF ESSEX.

STATEMENT OF THE CASE.

This case comes before the Court upon an appeal taken October 27, 1913, by the Town of Essex from a final decree of Judge Dodge entered on that date (p. 18) dismissing with costs a cross bill brought by the Town against the Telegraph Company, and, on the Telegraph Company's original bill, perpetually enjoining the Town,

> "its officers, agents and employees, from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of

> telegraph in said defendant town, or with the re-setting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant";

and allowing costs to the Telegraph Company on the original bill.

This decree is expressed to have been made upon the pleadings and the evidence "as filed and presented to the Court," and to be "in accordance with the opinion . . . heretofore rendered."

The original bill (pp. 1–5) was filed on July 31, 1905. On August 3, 1905, by consent, the prayer for relief was amended (p. 6) by making two insertions (p. 5, 17th line), so that it now corresponds, except in one immaterial particular, with the final decree.

On September 5, 1905, Judge Lowell issued a temporary injunction (p. 7), of which the material part corresponds exactly with the final decree.

The only ground of federal jurisdiction alleged in the bill is (p. 2) that the case "arises under the Constitution and laws of the United States," to wit, the Act of Congress "approved July 24, 1866," and "the Act of Congress of March 1st, 1884."

The gist of the case stated in the original bill is that the plaintiff, a Massachusetts corporation engaged in the business of interstate and international telegraphy, including the transmission of messages to and from the Government of the United States, having filed its written acceptance of the restrictions and obligations of the Act of Congress of July 24, 1866 (14 Stat. 221), in the year 1884, with the consent of the Selectmen of the town of Essex, an incorporated town of Massachusetts, erected and

has since maintained certain telegraph poles and wires on three streets in said town, which are post roads within the meaning of the Act of Congress of March 1, 1884 (23 Stat. 3), and are a necessary part of the company's interstate route to Rockport, Mass., where its line connects with an international cable; that by lapse of time certain of the poles have become "old and rotten, and certain of the wires inoperative," so that the line is unsafe, inefficient, and dangerous to the public, and "needs relocating on said highways" (p. 3), with new poles substantially in the positions of the old poles; that on June 1, 1905, the plaintiff "for the purpose of relocating its line," filed a written petition with the Selectmen of Essex, of which a copy is annexed to the bill and marked "A" (pp. 5–6), praying for a location for its poles and wires in said streets, but that the Selectmen by letter, of which a copy is annexed to the bill and marked "B" (p. 6), notified the plaintiff that they would not grant it "any locations for its poles and wires in the town" (p. 4), and at the same time the Selectmen orally declared to the plaintiff that they intended to prevent the plaintiff from maintaining any line of telegraph within the town, and to prevent the plaintiff, by force if necessary, from relocating any of its poles or repairing its lines; so that the plaintiff has been unable to re-set its poles or repair its line in Essex. The bill further alleges (Paragraph VI., pp. 4–5), that the statutes of Massachusetts do not permit a town to refuse to allow a telegraph company to make changes and repairs in its line necessary for efficiency and safety, "nor to refuse absolutely to allow a telegraph company to relocate its line, or to refuse such company any location whatsoever."

It is to be observed that the petition to the Selectmen, Exhibit A, which the bill alleges was the plaintiff's petition, was actually signed by a different company, namely, the New England Telegraph Company of New York. It is to be further observed that the notice from the Selectmen

referred to in the bill as Exhibit B, although signed by Aaron Cogswell, chairman of the Board, does not correctly state the actual vote passed by the Selectmen. The vote as extended and recorded in the official records of the Selectmen was introduced as defendant's Exhibit J (p. 52), and reads as follows:

> "July 10, 1905.
> Full Board present.
> Voted not to grant a location for poles and wires to the New England Telegraph Co. of N. Y."

The defendant's answer (pp. 7–11) put in issue most of the material allegations of fact of the bill, including the allegation that the plaintiff's original construction of its line in 1884 was with the permission of the Selectmen of that time, the allegation that any force was threatened against the plaintiff, and the allegation that the petition of June 1, 1905, was the petition of the plaintiff, averring, on the contrary, that it was the petition of a different company, viz., the New England Telegraph Company of New York (p. 11). But the answer admitted that

> "the town through its Selectmen have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town";

and that the Selectmen

> "forbade the plaintiff from re-setting its poles, from changing the location of its poles, from re-stringing its wires, or from doing business of any sort in said town on the highways of said town, until first a franchise was obtained therefor in accordance with the laws of the Commonwealth of Massachusetts."

The defendant's cross bill (pp. 12–14) prayed that the company might be ordered to remove its poles from the streets, and be restrained from using its poles and wires

"until it shall have first obtained a franchise from the Board of Selectmen"; alleging as a basis for this relief substantially the same matter contained in the town's answer to the original bill.

The company's answer to the cross bill (pp. 15–17) sets up some of the material allegations of fact contained in the original bill, makes certain admissions which will be referred to more particularly in the argument, and contains the following statement, which presents one of the fundamental issues in the case, namely:

> "The complainant denies that before a company organized for the purposes for which the complainant company was organized obtains any rights in the streets of any of the municipalities of Massachusetts, it was obligatory upon the complainants to obtain the consent of the Selectmen of the town of Essex, in accordance with the Statutes of the Commonwealth."

Replications were filled by both parties (p. 17). On April 17, 1912, an agreement (p. 17) as to some of the facts was filed, namely, that it was the plaintiff company that had erected and maintained on said three streets the telegraph line four miles long, consisting of 186 poles and six or seven wires; and that the "United States Government never contributed any sum toward the construction or care of" said streets. This agreement was later supplemented by another agreement (p. 39) that both the plaintiff and the New England Telegraph Company of New York had accepted the restrictions and obligations imposed by federal laws; and later by another agreement (p. 45) that the plaintiff was incorporated under the laws of Massachusetts April 7, 1884,

> "for the purpose of constructing lines of aerial or underground telegraph both within and without the limits of said Commonwealth, and the owning of interests in such lines, with the powers, rights, and

privileges, and subject to the limitations, duties, and restrictions which by law appertain thereto."

It was admitted that the Farmers Loan & Trust Company of New York owns the plaintiff's entire capital stock (p. 34).

The case was heard by Judge Dodge on June 23, 1913, on the pleadings and evidence (p. 18). On December 22, 1913, there was filed a condensed statement of the evidence (pp. 28–52) which may be taken to be equivalent to the evidence presented to Judge Dodge and mentioned in the decree. Such portions of this evidence as are material will be referred to in the argument and need not be summarized here. There is nothing in the evidence from which it can be inferred that the town did or did not own the fee in said streets. But Judge Dodge says (p. 23), "Ownership of the soil of these post roads is not claimed by the defendant town"; and the Town's cross bill, which is sworn to, contains the allegation that the fee of the highways is in the abutters, "subject to the right of the public to pass and repass thereon" (p. 13).

The gist of Judge Dodge's opinion is as follows: The complainant is a telegraph company within the meaning of Rev. Stats., Secs. 5263–5269, and accepted those provisions of law before it constructed its said line in the year 1884. Said streets are post roads within the meaning of Section 5263, and of the Act of March 1, 1884 (23 Stats. 3). The poles and wires are part of an interstate and international system. They do not as a matter of fact interfere with ordinary travel on the streets. On June 1, 1905, when the application of that date (Exhibit A, pp. 5–6) was filed with the Selectmen, repairs and a relocation of the defendant's line on the streets had become necessary. The Selectmen's refusal to grant the application was not on the ground that it was applied for in the name of the New York company with which the plaintiff is affiliated, but was a refusal to grant the plaintiff any location within the

town. The Selectmen desired to raise the question of the company's right to be in the town, and were prepared to resist construction or repair work by force. After the temporary injunction granted on the company's bill the changes made by the company "were only such as were necessary to keep the line in a reasonably safe condition," and "there have been no changes amounting to a change of the location occupied in 1884 and since." The company has not shown that it ever obtained any original location or legal right under the laws of Massachusetts to set its poles in the streets; but that fact does not justify the Selectmen in absolutely excluding the company from the said streets, still less in declining to grant a location or license on any terms whatever under the application of June 1, 1905. Since that is the interpretation which must be put upon the acts of the Selectmen, the conclusion is that the company was lawfully operating its line within the town.

The Town does not suggest that if the company's bill is dismissed, the cross bill can be retained. The Town's general position is that the decree should be reversed and the original bill dismissed with costs.

The assignment of errors filed October 27, 1913 (pp. 24–27), specifies eleven errors, all of which except the second will be relied upon in this brief. They are all involved in one or another of the following propositions, upon which the Town relies in support of its contention that the bill should be dismissed:

I. On the date of the filing of the petition of June 1, 1905, this plaintiff was occupying the streets of the Town of Essex without any right whatever, either under the laws of the Commonwealth or of the United States. (Assignments of Error, Nos. 1, 3, 4, 5, 6, 7, 9, 10, 11.)

II. The Selectmen's denial of the petition of June 1, 1905, did not impair any Federal right of the plaintiff under the Act of Congress of July 24, 1866. (Assignments of Error, Nos. 1, 4, 5, 9, 10, 11.)

III. The threats of the Selectmen furnish the company no ground whatever for equitable relief in a Federal court, either against the Town, or against the Selectmen themselves. (Assignments of Error, Nos. 1, 11.)

IV. Even if the preceding three main propositions were all unsound, the final decree should nevertheless be modified by inserting after the word "complainant" in the nineteenth line from the beginning, the words:

> "provided that nothing herein contained shall be construed to prohibit a reasonable exercise by the Board of Selectmen of the Town of Essex of the regulative powers concerning telegraph lines conferred upon said Selectmen as a public board by the laws of the Commonwealth of Massachusetts now or hereafter in force, or any action by the Town, its officers, agents, and employees, authorized or required by said laws." (Assignments of Error, Nos. 1, 4, 5, 8, 11.)

ARGUMENT.

I.

On the date of the filing of the petition of June 1, 1905, this plaintiff was occupying the streets of the Town of Essex without any right whatever, either under the laws of the Commonwealth or of the United States. (Assignments of Error, Nos. 1, 3, 4, 5, 6, 7, 9, 10, 11.)

A. The plaintiff had acquired no right to occupy the streets by complying with the statutes of the Commonwealth of Massachusetts in force from 1884, when the occupation began, to June 1, 1905.

(*a*) Under each of the three Massachusetts statutes in force from 1882 to 1905, defining the terms upon which any "company incorporated for the transmission of intelligence by electricity" might "construct lines of electric telegraph upon and along the highways and public roads" of the Commonwealth, it was necessary for this plaintiff in order to obtain the right to occupy any of the streets of the Town of Essex with its poles and wires to obtain from the Selectmen "a writing specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run."

(1) This requirement is found in Pub. Stats., Chap. 109, Sec. 3 (printed in full in the Record, p. 25), in force from 1882 to 1902; in Revised Laws, Chap. 122, Sec. 2 (printed in full in the Record, p. 26), in force from 1902 to 1903; and in Stat. 1903, Chap. 237 (printed in full in the Record, p. 26), in

force from 1903 until June 1, 1905, and thereafter; the only difference in the phraseology being the substitution in the two later statutes of the word "poles" for the word "posts."

(2) It has been decided by the Supreme Court of Massachusetts that "the general subject of the construction of lines for the transmission of intelligence on highways is regulated by" these statutes, and that they have always been "intended to govern and be a code for the whole subject." Per Rugg, C. J., in *Metropolitan Home Tel. Co.* v. *Emerson*, 202 Mass. 402, 406–407.

(3) The plaintiff in its original bill, and in its answer to the cross bill, expressly admits that Stat. 1903, Chap. 237, and its two progenitors, are the statutes by which the Commonwealth of Massachusetts has undertaken to define the right of telegraph companies to occupy its highways in so far as the Commonwealth has control over that subject. In its answer (p. 16) to the cross bill the plaintiff says,

> "The complainant says that the provisions of the statutes of the Commonwealth of Massachusetts in respect to the matters in question are contained in Chapter 237 of the Acts of the year 1903, and the complainant prays leave to refer to said act for such provisions."

See also the unmistakable references to the same statute in the original bill (pp. 3, 5).

(4) The provisions of Pub. Stats., Chap. 27, Sec. 49, and Rev. Laws, Chap. 25, Sec. 56 (both printed in full in the Record, pp. 25, 26), and of Rev. Laws, Chap. 25, Sec. 54, on the same subject (not printed in the Record), have been held by the Supreme Court of Massachusetts to be subordinate to the statutes above referred to, and not to define the method by which an original right to occupy the

streets of the Commonwealth, or to relocate poles, may be obtained.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402, 406–407.

Section 54 enables Selectmen

> "to establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph or telephone . . . by every person having authority to place poles, wires, structures, and other appliances for any purpose in or under public ways or places,"

the "authority" referred to being the authority conferred by Rev. Laws, Chap. 122, Sec. 2.

Section 56 contains the same limitation, and also the further limitation of applying only to private citizens as distinguished from corporations.

(*b*) The plaintiff never obtained or made any effort to obtain the written specification referred to in these statutes.

(1) Judge Dodge finds that the evidence is not

> "sufficient to prove that such a specification was ever given the plaintiff by the Selectmen. None is produced by the plaintiff, nor is any record of one found in the town records" (p. 23).

(2) And the evidence, though somewhat conflicting, clearly warrants the conclusion that the reason why no location and specifications were ever granted to this plaintiff was that it never applied for any.

Bartlett, son of the Chairman of the Board of Selectmen of the year 1884, testified that his father (who had died before the beginning of this suit) had always told him that the company had no permit and no location in Essex; that "the reason that led up to this was the crookedness"; and that the

reason why the company came through Essex without a location was that they preferred to do so rather than fight the "rich people" of the adjoining town, Manchester (pp. 41–42).

Raymond, the town treasurer, testified that the company had no location (p. 42).

Sargent, the town clerk, testified that he had carefully examined the records from 1861 to 1902, and found no record of any location granted to the company, and no sign of mutilation of the records (p. 39).

Kimball, a selectman, confirmed the testimony of Sargent on this point (p. 43).

Cogswell, another selectman, added that he had forced the company's foreman to admit that there was no record of any permit in 1884, and no mutilation of the records (p. 44).

There is no hint or suggestion that the company in 1884 or thereafter ever sought to compel the Selectmen by mandamus or otherwise to perform the duty apparently imposed upon them by these statutes to grant a location on some terms, if application were made. If application had really been made and refused, it seems incredible that the plaintiff would not have asserted its rights under these provisions.

To explain the absence of a legal "location" the company produced the testimony of some of its officers and employees, some of which corroborates the Town's evidence, and none of which confutes it.

Bruch, the company's treasurer, testified that the company's minute book contained no record of a location in 1884 (p. 29).

Pillsbury, the company's superintendent, testified that there was no record of any such permit in the company's books in Boston or New York, where such records are usually kept, if they exist (p. 31).

Hebb, a foreman, testified that the Selectmen of 1902 "claimed that the company did not have any permit or franchise through there" (p. 35).

Bartlett, an employee of the company in 1884, testified that he drafted a written application to the town for a "right of way" in 1884 and handed it to the Chairman of the Selectmen (also named Bartlett) at the latter's house (p. 33); but that he did not know whether a "permit" was ever granted on it (p. 33).

And Atchison, one of the company's inspectors, testified that in 1891 or 1892 hearing the company's right to be in the three streets questioned, he sent one Fisher, now dead, to examine the town records, and Fisher reported that the records had been mutilated or destroyed. But on cross-examination he added that Fisher "was merely under the supposition that the permit was on a leaf that was missing in one of the record books" (pp. 33–34).

The so-called petition of 1902 (complainant's Exhibit 3, pp. 45–46) was, according to the testimony, filed with the Selectmen, but never pressed and never acted on (Kimball, p. 42; Cogswell, p. 44). The petition of June 1, 1905, was a copy of the first part of the petition of 1902 (Pillsbury, pp. 30, 31–32; Hebb, pp. 35, 36).

(3) It is to be observed that both the petitions of 1902 and 1905 (Exhibit 3, pp. 45–46; Exhibit I, p. 51) were in the name not of the plaintiff, but of another existing company, the New England Telegraph Company of New York. There was an agreement concerning the latter company (p. 39), which shows that it was an existing and separate corporation; and although the company's treasurer, Bruch, testified that this was a "slip of the pen" (p. 29), and the company's superintendent, Pillsbury, testi-

fied that it was an "error" (p. 32), it was never corrected, and Pillsbury himself admits that no written application for a specification was ever made by the plaintiff, and no written refusal of such a petition was ever made by the Selectmen (p. 32). Moreover, the vote of the Selectmen as actually entered in their records (Exhibit J, pp. 52, 43) was "not to grant a location for poles and wires to the New England Telegraph Company of N. Y."; and notice of this vote was sent to that company at New York City (Exhibit 5, p. 46; Exhibit D, p. 48), and was acknowledged by Mr. Pillsbury himself "on behalf of the New England Telegraph Company of New York" (Exhibit C, p. 47). It therefore clearly appears affirmatively that the only petitions ever received by the Selectmen were not from the plaintiff, but from a different company; and, negatively, that the plaintiff company, which it is agreed was the owner of the lines (p. 17), never made any application for the writing referred to in the statute, and was never refused such a writing.

(4) The express statement of Judge Dodge at the end of his opinion, and the intimation conveyed thereby, that "the plaintiff has been at least since 1905 constantly in the attitude of requesting the town to give the specification," and the preceding sentence that,

> "no failure on the plaintiff's part to do anything which the Town has a right to require under the statutes, state or federal, or can otherwise reasonably require as a condition of giving the specification appears,"

are both incorrect and misleading. *For it does not seem to have been called to the attention of Judge Dodge that under the decisions of the Supreme Court of Massachusetts, the selectmen of a town in granting*

a writing under Stat. 1903, Chap. 237, or its progenitors, Rev. Laws, Chap. 122, Sec. 2, and Pub. Stats., Chap. 109, Sec. 3, and the original statute of 1849, Chap. 93, Sec. 2, act not for the town, or as officers or agents of the town, but as an independent public board representing the Commonwealth directly, and exercising a quasi-judicial authority.

Young v. *Yarmouth*, 9 Gray, 386, 389.
Commonwealth v. *Boston*, 97 Mass. 555, 557.
Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402, 404–405.

Under these decisions an application to the selectmen is not an application to the town, and it is not correct to speak of the town as having a "right to require" anything under these statutes, or of a company as "requesting" the town to give the specification. This misconception of the relation of the selectmen to the Commonwealth and to the town vitiates, as will later appear, the entire reasoning of the learned judge.

(*c*) If it be urged that these statutes do not require that the obtaining of the "writing" shall precede the physical occupation of the streets, the answer is that that is precisely what they do require.

The Commonwealth of Massachusetts has undertaken to exercise its regulative powers over telegraph companies by two sets of statutes, the first set being the statutes with which we have just been dealing, defining the terms upon which a company may obtain from the selectmen as the representatives not of the town, but of the state, an original location, *i.e.*, an original right to enter the town at all; and the second set, being Pub. Stats., Chap. 27, Sec. 49, and Rev. Laws, Chap. 25, Sec. 54, conferring upon the Select-

men power *after* locations (or relocations) have been obtained to "establish reasonable regulations for the erection and maintenance" of the lines.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.

The fact that the last part of Stat. 1903, Chap. 237, overlaps to a certain extent these subordinate statutes, does not affect the general relation of the two sets of statutes.

It may well be the case that companies that have complied with the former statutes regulating the obtaining of locations or relocations, may properly wait for the selectmen to take action in reference to subsequent regulations, and need not themselves take the initiative in applying for such regulations. But the reverse is the case in the matter of the original occupation of any defined portion of a Massachusetts highway, or of any subsequent change in such occupation either from one part of the same street to another part, or to a different street. The word "location" in the statutes of Massachusetts means primarily not physical situation or occupation but the *legal right* of a company physically to occupy a certain part of the highway.

Foster v. *Park Commissioners*, 133 Mass. 321, 332.
Abbott v. *N. Y. & N. E. R.R.*, 145 Mass. 450.
Cambridge v. *Railroad Commissioners*, 153 Mass. 161, 167.
Watertown v. *County Commissioners*, 176 Mass. 22.
Hewitt v. *Canton*, 182 Mass. 220.
Flood v. *Leahy*, 183 Mass. 232.
Worcester v. *Worcester St. Ry.*, 192 Mass. 106.
Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Postal Telegraph Cable Co. v. *Chicopee*, 207 Mass. 341, 345.

In *Abbott* v. *New York and New England R.R.*, supra, Mr. Justice Holmes, speaking for the Court, and construing an act of the legislature giving the railroad three years in which to locate and construct its line, said, page 456:

> "The word 'locate' is a term of art, in using which the legislature can have had but one meaning."

In *Worcester* v. *Worcester St. Ry. Co.*, supra, Mr. Justice Braley, speaking for the Court, said, page 113:

> "Under the provisions of Section 7 (Pub. Stats., Chap. 113, relating to street railways) the board of aldermen and selectmen of towns were authorized to grant original locations to street railway companies, subject to such 'restrictions' as they deemed the public interest required. This word is used in connection with a grant of an interest in real property in a sense analogous to 'conditions,' and either term may denote a limitation upon the full and unqualified enjoyment of the right or estate granted."

In *Foster* v. *Park Commissioners*, supra, Mr. Justice Field, speaking for the Court, said, page 332:

> "The ordinary meaning of the words 'to locate' is 'to ascertain and determine the place of,' and in this sense they might well be used in connection with the technical words 'to lay out.'"

In *Cambridge* v. *Railroad Commissioners*, supra, Mr. Justice Morton, speaking for the Court, said, page 167:

> "The word 'locate' seems to have been used in numerous instances as equivalent to 'lay out,' and to include, like that, the power to fix grades; and we think this is a reasonable construction."

In *Watertown* v. *County Commissioners*, supra, Mr. Justice Barker, speaking for the Court, said, page 29:

> "The main purpose of locating anew is to establish the boundary lines of a road which are in doubt or dispute."

In *Hewitt* v. *Canton*, supra, Mr. Justice Lathrop, speaking for the Court, said, page 223:

> "But it is well settled that the selectmen *in granting a location* do not act for the town, but as public officers exercising a quasi judicial authority." (Italics ours.)

In *Flood* v. *Leahy*, supra, Mr. Justice Hammond used (p. 236) almost identical language; and in *Metropolitan Home Tel. Co.* v. *Emerson*, supra, Mr. Justice Rugg, speaking for the Court, said, pages 404–405:

> "A permit or location is different in kind from a franchise, and is inferior and subsidiary to it. . . . A permit, specification, or location is narrow and definite, adapted to immediate or early use or service, and depending upon present conditions."

In *Postal Telegraph Cable Co.* v. *Chicopee*, supra, Mr. Chief Justice Knowlton, speaking for the Court, said, page 345:

> "This was the first location granted in the city of Chicopee for the erection and maintenance of electric wires."

But in order that these statutes regulating locations and relocations may have any effect at all, they must be construed as requiring the application or petition to be made and the specification to be issued *before* and not after the actual occupation of streets by the com-

pany. Any other construction would give the company the right to determine its own location or relocation, and would leave to the selectmen only the right to ratify or not. That this is not the meaning of the statutes is sufficiently obvious from their language. Stat. 1903, Chap. 237, refers to towns "through which the lines of a company *are to pass*"—not to towns through which they have already passed. The same language is found in Rev. Laws, Chap. 122, Sec. 2, and in Pub. Stats., Chap. 109, Sec. 3. The specification is to state "where the posts [poles] *may be* located" —not whether the place where they *have been* located is proper. And in Stat. 1903, Chap. 237, we find additional evidence of the same purpose in the use of the words, "any company . . . desiring permission to erect poles . . . shall in writing petition," etc.; and "ways upon which it *is proposed to construct said line.*" And in reference to relocations the language of all three statutes even more plainly shows that the direction of the selectmen must precede the change, if it is to be legal. In every decision of the Supreme Court of Massachusetts in which this question has been at all involved, it is assumed as a matter of course that under these statutes neither an original location nor a relocation can be valid unless it is applied for and the specification granted before any actual occupation of the streets.

Hill v. *County Commissioners*, 4 Gray, 414.
Young v. *Yarmouth*, 9 Gray, 386.
Commonwealth v. *Boston*, 97 Mass. 555.
Pierce v. *Drew*, 136 Mass. 75.
Suburban Light & Power Co. v. *Boston*, 153 Mass. 200.
Met. Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Postal Tel. Cable Co. v. *Chicopee*, 207 Mass. 341.

In reference to similar statutes of other states this Court, as well as an inferior federal court, has expressed the same view.

In *New York* v. *Squire*, 145 U. S. 175, Mr. Justice Lamar, speaking for this Court, said, page 190:

> "It would be an anomaly in municipal administration if every corporation that desired to dig up the streets of a city and make underground connections for sewer, gas, water, steam, electricity, or other purposes, should be allowed to proceed upon its own theory of what were proper plans for it to adopt, and proper excavations to make. The evils that would follow from such a system of practice would be of great gravity to the public and would entail endless disputes and bickerings with prior parties having equal rights."

In *Laclede Gas Light Co.* v. *Murphy*, 170 U. S. 78, Mr. Chief Justice Fuller, speaking for this Court, at pages 98–99 uses similar language; and in *City of Toledo* v. *Western Union Telegraph Co.*, 107 Fed. 10 (C. C. A. 6th Cir.), the Court said, page 12:

> "It is necessary for its fire protection, and a proper knowledge of the obstructions in its streets and the use to which its public places are being subjected, for the city to know *before any construction is put in* what is contemplated, and to have the work done under the supervision of its officers, and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city." (Italics ours.)

B. The plaintiff had acquired no right to occupy said streets by lapse of time or by the acquiescence of any officials.

(*a*) Even if the plaintiff had by complying with the law in 1884 acquired an original legal location, no

occupation under that location however long continued or unchallenged could have been a substitute for strict compliance with the original and all subsequently imposed conditions.

(1) Pub. Stats., Chap. 109, Sec. 15 (printed in full in the Record, p. 25), provides that,

> "No enjoyment by a person or corporation for any length of time of the privileges of having or maintaining telegraph posts, wires, or apparatus in, upon, over, or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easements, or raise any presumption of a grant thereof."

(2) The corresponding provision of the Revised Laws, Chap. 122, Sec. 26 (printed in full in the Record, p. 26), is substantially the same. It is to be noted that in the tenth paragraph of its answer (p. 17) to the Town's cross bill, the plaintiff apparently explicitly admits that this section applies not only to a corporation that has once legally obtained the privilege of maintaining a line in a town, but also to a company that has actually maintained a line without obtaining specifications from the selectmen. If the plaintiff is held to this admission, the remainder of the argument under proposition *B*, *supra*, becomes unnecessary.

(*b*) *A multo fortiori* the company could not acquire any right to occupy the streets either by lapse of time or by the acquiescence of officials when its occupation was, as in this case, a continuing public nuisance.

(1) A permanent occupation of a portion of a public highway, whether by the poles and wires of a telegraph company, or in any other manner, without legislative authority, is at common law and by

the law of Massachusetts a public nuisance punishable by indictment.

Regina v. *United Kingdom Elec. Telegraph Co.*, 9 Cox Crim. Cas. 174.
3 Dillon Municipal Corporations, 5th Ed., Sec. 1220, and cases cited.
Commonwealth v. *King*, 13 Met. 115.
Commonwealth v. *Upton*, 6 Gray, 473.
Young v. *Yarmouth*, 9 Gray, 386.
Morton v. *Moore*, 15 Gray, 573, 576.
Commonwealth v. *Boston*, 97 Mass. 555.
Banks v. *Highland St. Ry.*, 136 Mass. 485.
New Salem v. *Eagle Mill Co.*, 138 Mass. 8.
Hines v. *Brewer*, 194 Mass. 435.

In *Commonwealth* v. *King*, supra, Dewey, J., speaking for the Court, at page 118, said:

"By the location of a public highway, with certain defined exterior limits, the public acquire an easement coextensive with the limits of such highway. Whoever obstructs the full enjoyment of that easement, by making deposits within such limits of the located highway of timber, stones, or other things, to remain there and occupy a portion of such public highway, is guilty of a nuisance at common law."

In *Banks* v. *Highland St. Ry. Co.*, supra, Colburn, J., speaking for the Court, said, page 486:

"As the telegraph company had no such writing, it had no right to run its wires across Columbus Avenue, as the plaintiff was doing, at the time of his injury. The wire, at least while looped across the street, so that it might be hit by passing carriages, was a nuisance, which any person lawfully travelling on the way, and incommoded by it, might remove."

And in that case it was held that the plaintiff, who was injured by the negligence of the defendant, could not recover because at the time he was injured he was engaged in a criminal act. That case involved Gen. Stats., Chap. 64, Sec. 3, an early form of one of the same statutes with which we are dealing.

Commonwealth v. *Boston*, supra, was an indictment against the municipality for permitting one of its streets to be obstructed by telegraph poles. There was a verdict of guilty. The poles were erected by a corporation established by the laws of New York, but acting under a written specification granted by the mayor and aldermen of Boston under Gen. Stats., Chap. 64, Sec. 3, the same statute that was involved in *Banks* v. *Highland St. Ry.*, supra. It was held that while specifications granted in a case of which the mayor and aldermen of a city or selectmen of a town had jurisdiction, were conclusive upon the rightfulness of the erection of poles in public highways, the jurisdiction conferred by the statute must be strictly confined to the cases therein enumerated, and did not extend to a company organized not under the laws of Massachusetts, but under the laws of some foreign state. The conviction was, therefore, affirmed on the ground that the unauthorized erection of poles and wires upon a public highway was a public nuisance.

In explanation of the fact that the city was indicted, it may be mentioned that under the charter of that day (Stat. 1854, Chap. 448, Sec. 41), the board of aldermen were surveyors of highways, and that under the General Laws then in force (Gen. Stats., Chap. 18, Secs. 75 and 76), if a town was sentenced to pay a fine for a public nuisance consisting of a defect in the highway, the town

could recover the amount of the same of the surveyor of highways, provided the defect was due to his neglect; and that the surveyor also was liable to indictment.

(2) And it is equally well settled in Massachusetts that such a nuisance cannot be legalized by mere lapse of time, or other informal action of public officials. Stat. 1903, Chap. 237, expressly provides that "no such order or specification shall be valid without such certificate," meaning the certificate of the town clerk of notice and hearing; and the two prior statutes require the authorization to be in writing, with certain specifications.

Moreover, the wrong is a continuing one, and is rather aggravated than diminished by lapse of time. The omission of grand juries to indict, or of individuals suffering special annoyance to abate it, or of surveyors of highways and road commissioners to abate it under the authority of Pub. Stats., Chap. 52, Sec. 10, and Rev. Laws, Chap. 51, Sec. 10, cannot bar the Commonwealth of its remedy by indictment. The acquiescence of the Selectmen and of the town itself is wholly immaterial, since neither the town nor the Selectmen (either as agents of the town, or as a quasi-judicial board representing the Commonwealth) are given any right under the laws of Massachusetts to abate public nuisances. In any event, the point is settled by authority.

Com. v. *Upton*, 6 Gray, 473.
Morton v. *Moore*, 15 Gray, 573, 576.
New Salem v. *Eagle Mill Co.*, 138 Mass. 8.

In *Morton* v. *Moore*, supra, Merrick, J., speaking for the Court, said, page 576:

> "Such an obstruction, however long it may be continued, is still unlawful; and therefore no

right can be acquired by persisting in the maintenance of it. It may at any time be abated by indictment."

In *New Salem* v. *Eagle Mill Co.*, 138 Mass. 8, Mr. Justice Holmes, speaking for the Court, and referring to the case of *Cutter* v. *Cambridge*, 6 Allen, 20, said, page 9:

"But we do not read that case as intended to overrule the then recent decisions that a public nuisance was not legalized by being maintained for twenty years."

The following ruling of the court below was sustained:

"That no prescriptive right can be maintained to create a public nuisance, or to bar the right of action by the plaintiff town."

C. The plaintiff prior to the filing of the petition of June 1, 1905, had acquired no right under the Act of Congress of July 24, 1866, to occupy said streets.

(*a*) Even if we adopt for purposes of argument (but not otherwise) that one of the two competing views of the scope of the Act of 1866 which regards that act as conferring a positive right upon telegraph companies which have complied with its provisions to occupy the highways of a state, subject only to the reasonable regulative powers of the state, exercised directly or through subordinate tribunals, the plaintiff still remains on June 1, 1905, a trespasser in the highways of the Town of Essex; for—

(1) As has been shown, the only three statutes by which the Commonwealth of Massachusetts in the period from 1884 to June 1, 1905, had undertaken to regulate the original location and construction of telegraph lines on its highways, were Pub. Stats.,

Chap. 109, Sec. 3 (p. 25), Rev. Laws, Chap. 122, Sec. 2 (p. 26), and Stat. 1903, Chap. 237 (p. 26).

(2) These three statutes cannot be regarded as in themselves conferring arbitrary or unreasonable powers upon the Selectmen. For if the Selectmen are given power absolutely to exclude such a company from all the streets in the town—a power which, if granted, seems to apply only to electric light companies and not to telegraph companies (*Suburban Light & Power Co.* v. *Boston*, 153 Mass. 200),—that power can be exercised only where they determine that the use of any street in the town would "incommode the public use of public ways" within the meaning of Rev. Laws, Chap. 122, Sec. 1 (pp. 25–26), which was not repealed by Stat. 1903, Chap. 237 (p. 26), and of Pub. Stats., Chap. 109, Sec. 2 (p. 25).

Pierce v. *Drew*, 136 Mass. 75, 77–78.

But this limitation is recognized by the Act of Congress itself in the words (Rev. Stats., Sec. 5263):

> "But such lines of telegraph shall be so constructed and maintained as not to . . . interfere with the ordinary travel on such military or post roads."

The only other power given to the Selectmen by these statutes with reference to original locations is the power to specify "where the poles may be located, the kind of poles, and the height at which and the places where the wires may run." These powers constitute obviously only a very moderate exercise of the police power of the State in the interest of the public safety, have only an incidental and remote effect upon interstate commerce (*Postal Telegraph Co.* v. *Chicopee*, 207 Mass. 341, 350), and

are far less elaborate and inconvenient than powers granted by the statutes of other States, the constitutionality of which has been upheld by this Court.

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160.

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92.

(3) Moreover, there is no ground for the assumption that if the plaintiff had petitioned the Selectmen of 1884 for a location, they would have dealt with such a petition unreasonably or arbitrarily. The record contains not the slightest evidence to warrant the inference that they would have so acted, and of course the presumption is the other way.

Gundling v. *Chicago*, 177 U. S. 183.

In that case Mr. Justice Peckham, speaking for the Court, said, page 186:

> "He made no application for a license, and of course the mayor has not refused it. Non constat that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor, and was not refused a license."

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160.

In that case Mr. Justice Holmes, speaking for the Court, said, page 168:

> "If the committee and officers do their duty there is no room in the questions left to them for arbitrary whim. . . . The objection that other motives may come in is merely that which may be made to all authority, that it may be dis-

honest, an objection that would make government impossible if it prevailed."

(b) *But the Act of Congress of July 24, 1866, confers no positive right upon any telegraph company which has complied with its provisions to occupy public highways in a state without first obtaining the permission of the state as the owner of the soil, or of the public easement therein, whether the consent of the state or of the subordinate tribunal to which the state has delegated its power is unreasonably withheld or not.*

The cases of importance in which this Court has discussed the nature and limitations of the right conferred by the statute upon telegraph companies with reference to the police power of the state either to occupy the highways of a state in the first instance, or to continue to occupy the highways after an original legal occupation, are the following:

Pensacola Tel. Co. v. *Western Union Tel Co.*, 96 U. S. 1.

Western Union Tel. Co. v. *Mass.*, 125 U. S. 530.

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92, 100–101.

St. Louis v. *Western Union Tel. Co.*, 149 U. S. 465, 471.

Postal Telegraph Co. v. *Baltimore*, 156 U. S. 210.

Western Union Tel. Co. v. *Ann Arbor*, 178 U. S. 239.

Western Union Tel. Co. v. *Penn. R.R. Co.*, 195 U. S. 540.

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160, 167–169.

This aspect of the statute has also been discussed in the following Massachusetts cases:

Banks v. *Highland St. Ry.*, 136 Mass. 485.

Postal Telegraph Co. v. *Chicopee*, 207 Mass. 341, 343.

And in

Postal Telegraph Co. v. *City of Newport*, 25 Ky. L. Rep. 635.

American, etc., Co. v. *Hess*, 125 N. Y. 641.

City of Toledo v. *Western Union Tel. Co.*, 107 Fed. 10, 12–13.

Sunset Tel. & Tel. Co. v. *Pomona*, 164 Fed. 561; affirmed 224 U. S. 330.

The cases in which the effect of this statute or of the interstate commerce clause of the constitution upon the right of the state to impose upon telegraph companies a license fee or tax as a condition of granting to them the privilege of doing business within the state has been considered, are not in point. The case at bar does not involve in any way the question whether a state can require a party, whether a telegraph company or anybody else, to take out a license for the privilege of carrying on interstate commerce, or whether a state can tax the property of a corporation not situated within the state. Cases turning upon this sort of question are:

Western Union Tel. Co. v. *Texas*, 105 U. S. 460.

Western Union Tel. Co. v. *Pendleton*, 122 U. S. 347.

Leloup v. *Mobile*, 127 U. S. 640.

Postal Tel. Co. v. *Adams*, 155 U. S. 688.

Western Union Tel. Co. v. *Taggart*, 163 U. S. 1.

Western Union Tel. Co. v. *New Hope*, 187 U. S. 419.

Atlantic, etc., Telegraph Co. v. *Philadelphia*, 190 U. S. 160.

Western Union Tel. Co. v. *Missouri*, 190 U. S. 412.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.

Williams v. *Talladega*, 226 U. S. 404.

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, supra, the Pensacola Company had erected a telegraph line upon the right of way of a certain railroad running from Florida into Alabama, and later obtained an act of the Florida Legislature giving it the exclusive right to maintain a telegraph line on that route. The railroad later granted to the Western Union Telegraph Company the right to erect a telegraph line upon the same right of way, and the case was a bill in equity by the Pensacola Company to enjoin the Western Union Company from constructing that line. There was a final decree for the plaintiff on the ground that the statute of Florida was in conflict with the Act of Congress of July 24, 1866, so far as it undertook to prevent a company which had accepted the Act of 1866 from using a right of way within the State which such company had secured by private arrangement with the owner of the land. The gist of the case is stated in the following language of Mr. Chief Justice Waite, speaking for this Court, page 11:

> "The statute of July 24, 1866, in effect amounts to a prohibition of all state monopolies in this particular. . . . It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

In other words, while the case decides that the state cannot in its political or sovereign capacity favor one telegraph company over another, *it does not decide that the state cannot as a landowner, or the owner of an easement in its own highways, give or withhold its consent to the occupation of its property just as a private owner could do.* This case also, of course, by implica-

tion decides that railroads are "post roads" within the meaning of the statute, and that was the principal ground of the dissent of Mr. Justice Field and Mr. Justice Hunt.

Western Union Telegraph Co. v. *Massachusetts*, supra, though often referred to in this connection, was a taxation case, and decides merely that the Act of 1864 does not exempt telegraph companies from ordinary taxation upon their property owned and used within the state; but does prevent the collection of such taxes by injunction forbidding the further transaction of business within the state until such tax has been paid. The case, though frequently cited in discussions concerning the right of a telegraph company under the Act of 1866 to enter a state, has in reality no bearing upon that question, because no question was raised but that the company was already lawfully in the state. As pointed out by Mr. Justice McKenna in *Western Union Tel. Co.* v. *Penn. R.R. Co.*, supra (at p. 564), in *Western Union Tel. Co.* v. *Massachusetts*,

> "The telegraph company was in occupation of the post roads of the state of Massachusetts, whether railroads or the ordinary highways does not appear. *Its right to be there was not controverted, and how it got there was of no consequence.*" (Italics ours.)

In *St. Louis* v. *Western Union Tel. Co.*, supra, the point decided was that a telegraph company has no right under the Act of 1866 to occupy the public streets of a city without compensation, and that a municipal charge for such use of the streets by the erection of poles, etc., is not a tax on the privilege of conducting interstate commerce within the state. Mr. Justice Brewer, speaking for this Court, said, page 97:

> "Clearly this is no privilege or license tax. . . . It is more in the nature of a charge for the use of

property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship,' (citing state Freight Tax Case, 15 Wall. 232, 278). If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax."

And again, page 99:

"All that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. . . . We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto."

And again, page 100:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, *it cannot abridge any property rights of a public character created by the authority of another sovereignty.*" (Italics ours.)

And again, page 101:

> "And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. . . . This rule extends to streets and highways; they are the public property of the State. . . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

This decision appears to be conclusive of the proposition that the Act of Congress of 1866 confers upon telegraph companies no positive right whatever against any state regarded in its capacity as the owner either of the soil of its own highways, or of the public easement of travel thereon.

St. Louis v. *Western Union Tel. Co.*, 149 U. S. 465, was a petition for rehearing filed by the Telegraph Co. after the decision reported in 148 U. S. 92, in which this Court said:

> "We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has the full control of its streets in this respect and represents the public in relation thereto."

Counsel for the petitioner claimed that the Court misunderstood the company's position, and that in

fact the city of St. Louis had no such control. But Mr. Justice Brewer, speaking for this Court, said, page 467:

> "We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best."

In *Western Union Tel. Co.* v. *Ann Arbor R.R. Co.*, supra, the bill was filed by the telegraph company against the railroad company to restrain the latter from interfering with the plaintiff's rights in a certain telegraph line along the defendant's railroad. The suit was brought in the state court, and the defendant attempted to remove it on the ground that it arose under the constitution and laws of the United States. The question at issue was whether the suit did so arise, and it was held that the bill properly construed asserted that the right to maintain the telegraph line along the defendant's railroad was based upon a contract, and not upon the Act of 1866. Mr. Justice Fuller, speaking for the Court, said, page 244:

> "As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

This is merely a re-assertion of the proposition that *the Act of 1866 has nothing whatever to do with the acquisition of property rights, whether of private individuals, or of municipalities, or of a state.*

In *Western Union Tel. Co.* v. *Penn. R.R. Co.*, supra, the bill was to prevent the railroad from removing from its right of way the plaintiff's telegraph lines. It was filed in aid of a petition at law designed to determine the amount of compensation that the telegraph company should pay to the railroad under the Act of July 24, 1866, for the use of the right of way. The decision was that the Act of July 24, 1866, does not confer upon telegraph companies the right to enter upon private property without the consent of the owner, or grant any right of eminent domain, and that the bill should be dismissed. Mr. Justice McKenna, speaking for this Court, reviewed the previous decisions hereinbefore referred to; stated (p. 562) that the fundamental point decided in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* was merely that the statute "*in effect amounts to a prohibition of all state monopolies*"; that in *Western Union Telegraph Co.* v. *Massachusetts* no question was involved of the nature of the telegraph company's right to be in the state at all; that the essential point decided in *St. Louis* v. *Western Union Telegraph Co.* was that the telegraph company could not continue to occupy the streets of St. Louis without paying the rental required by the municipal ordinance, and that "there can be no entry upon property without payment of compensation"; and said, page 567:

> "Certainly, as to private property or rights, the non-consent of the owner is a factor to be dealt with. Non-consent, if resolute, can only be overcome by power conferred by law; in other words, by the exercise of eminent domain."

And again, page 569:

> "But in the act of July, 1866, there is not a word which provides for condemnation or compensation."

In *Western Union Tel. Co.* v. *Richmond*, supra, the bill was to restrain the enforcement of an ordinance of the city of Richmond on the ground that it infringed the telegraph company's rights under the Act of Congress of July 24, 1866, under the commerce clause of the Constitution, and under the Fourteenth Amendment. The ordinance forbade the erection of poles and wires until the city engineer should first have determined the size, quality, and other particulars thereof; gave the Committee on Streets power to require the telegraph company to permit the wires of other companies to be placed upon its poles on reasonable terms; subjected the poles and wires to the inspection of certain officials of the fire department for the determination of the safety of insulations, etc.; provided a fine for each day's failure to obey an order of these officials; and required the removal within a certain time of all overhead wires within a certain territory, and the substitution of conduits under the supervision of a committee as to size, shape, etc. It was held that this ordinance was not in conflict with the Act of July 24, 1866, or with the Constitution. Mr. Justice Holmes, speaking for this Court, said, page 168:

> "The appellant says that it has the right to occupy the streets of Richmond under the act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. Neither branch of this proposition, as applied to this case, commands our assent. . . . In view of what we have said and the appellant's admission that it is subject to reasonable regulation, it would be unnecessary to consider its rights under the act of Congress but for some further complaint that the appellant's property is taken without due process of law. That complaint opens the question what property the appellant has."

The learned judge then reviews the previous decisions of this Court already referred to, and proceeds, pages 169–170:

> "Any license that the city may have granted as owner or representative of the owner of the public easement or otherwise may be assumed to have been revoked, and so far as the city's title is infringed by the appellant nothing appears to limit the city's right to insist upon it, as fully as a private owner might. Leaving the question of title on one side, except so far as to note that the appellant does not show one, and that the city has power to admit it to the highways, the other regulations complained of do not violate the appellant's constitutional rights. When the appellant without the right to exercise the power of eminent domain desires to occupy land belonging to others, *prima facie* it must submit to their terms. We assume, as we have said, that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles. . . . Even assuming, as seems to be implied by some of the language in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 104, 105; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, that in consequence of the act of Congress, the city is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable in view of the position of the parties."

It is to be observed that the Court does not here decide that the city "is restricted to reasonable demands," and is thus in a worse position than a private owner. It is submitted that the logic of the situation, including the proposition decided in *St. Louis* v. *Western Union Telegraph Co.*, forbids any discrimination between the state as an owner and a private individual as an owner. Some of the illustrations put in the opinion in *St. Louis* v. *Western Union Telegraph Co.* are entirely inconsistent with such a discrimination; for instance,

the suggestion that under a franchise from Congress to construct an interstate railroad, the grantee could not enter upon the state-house grounds of a state and build a depot there without either condemning the land, or coming to terms by private treaty with the state as a landowner. *The time, we submit, has come to decide squarely that so far as the original right to occupy the highways of a state is concerned, the Act of 1866 has no application, and leaves the company no better off than it would be without the statute.* Full effect can be given to the statute without making any discrimination between the state as an owner of its highways, and individuals as owners of their real estate, and any attempt to make such discrimination inevitably involves the taking without compensation of interests recognized as property (and sometimes as very valuable property), of which the ownership, though in a state, is, as against the national government, strictly private ownership.

The Massachusetts, Kentucky, and New York cases, and the decisions of the Circuit Court of the So. Dist. of California and the Circuit Court of Appeals for the Sixth Circuit, above cited, are in accord with this view of the Act of July 24, 1866.

In *Banks* v. *Highland St. Ry. Co.*, 136 Mass. 485, it was decided that the obtaining of the specification under the state statute was a prerequisite to the right to occupy the streets at all, notwithstanding the Act of Congress of July 24, 1866.

In *Postal Telegraph Co.* v. *Chicopee*, 207 Mass. 341, it was decided that a city might burden the location with the obligation of permitting the city, free of charge, to place its fire alarm, telegraph, or other wires upon the company's poles, notwithstanding the Act of Congress.

In *Postal Telegraph Cable Co.* v. *Newport*, 25 Ky. L.

Rep. 635, Mr. Justice Hobson, speaking for the Court, said, page 637:

> "The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress referred to in the answer [the act of July 24, 1866, and the acts amendatory thereof] conferred on the defendant no right to use the streets and alleys of the city of Newport which belonged to the municipality. This was expressly held in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, and *Postal Telegraph Co.* v. *Baltimore*, 156 U. S. 210. The acts of Congress are only permissive so far as the rights of the Federal government go. The defendant entered on the streets soon after the ordinance was passed and constructed its system. It had no authority to do so except under the ordinance."

In *American, etc., Co.* v. *Hess*, 125 N. Y. 641, it was held that the provisions of the United States statutes authorizing the construction and maintenance by telegraph companies of their lines over and along any military or post roads, and making all letter carrier routes in cities post roads (U. S. R. S., Pars. 3964–5263, 5668, Act of March 1, 1884), confer no rights upon such corporations which can operate to divest the state of control over its public highways, or to interfere with their use as such.

In *Sunset Telephone & Telegraph Co.* v. *Pomona*, 164 Fed. 561, the Court in discussing the Act of Congress of July 24, 1866, said, pages 569–570:

> "Said act does not grant to telegraph companies the right to enter upon private property without the consent of the owner, nor the right of eminent domain. . . . Nor does it confer upon them the right to occupy with their poles, wires, and other fixtures the streets of a city without the latter's consent."

In *City of Toledo* v. *Western Union Tel. Co.*, 107 Fed. 10, it was held that a telegraph company had no right under the Act of Congress to string its wires without first obtaining a permit from the municipal authorities stating exactly what was required in accordance with a municipal ordinance.

If it is urged against this construction of the Act of 1866 that the Commonwealth of Massachusetts in the very statutes in question has recognized a greater force in the Act of Congress of July 24, 1866, by making it mandatory upon the Selectmen to grant an original location somewhere in the town, the answer is two-fold: first, that the statute of Massachusetts in this apparently mandatory form was first enacted in 1849 (Stat. 1849, Chap. 93, Sec. 3), long before the Act of Congress was passed; and, second, that there is at least doubt whether the statute of Massachusetts is mandatory.

Pierce v. *Drew*, 136 Mass. 75.
Suburban Light & Power Co. v. *Boston*, 153 Mass. 200.

(*c*) On the undisputed facts in this case, the Commonwealth of Massachusetts was the owner of an easement for public travel in these streets within the meaning of the decisions in *St. Louis* v. *Western Union Tel. Co.*, supra, and *Western Union Tel. Co.* v. *Richmond*, supra; for—

(1) It is an agreed fact that the "United States Government never contributed any sum toward the construction or care of" said streets (p. 17).

(2) In the town's cross bill (sworn to, p. 15) it is alleged (pp. 12–13) that these streets are "public highways," and that the fee in them is owned by the abutters, "subject to the right of the public to pass and repass thereon." This is the ordinary

situation in Massachusetts where the Commonwealth is regarded as the owner of an easement for public travel.

N. E. Tel., etc., Co. v. *Boston Terminal Co.*, 182 Mass. 397.

That was a petition by the telephone company for the assessment of damages under a statute establishing the Boston Terminal Company and authorizing it to build a union passenger station in Boston, with powers of eminent domain, and provisions for the assessment of damages. In certain streets discontinued under this act the plaintiff had installed certain irremovable conduits and wires, for the injury to which it claimed damages under the statute. It was held that no damages could be recovered. Knowlton, C. J., speaking for the Court, said, page 399:

> "In this Commonwealth on the laying out and construction of a highway or public street, the fee of the land remains in the landowner, and the public acquire an easement in the street for travel. This easement is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public, and every reasonable means of transportation, transmission, and movement beneath the surface of the ground as well as upon or above it. Accordingly it has been held that the public easement which is paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires of telegraph, telephone and electric lighting companies, and for water pipes, gas pipes, sewers and such other similar arrangements for

communication or transportation as further invention may make desirable. . . . The permanent structures above referred to are permitted because they are used by the public or a part of the public, or are held and used in private ownership for the benefit of the public. The rights in the streets which are so exercised or enjoyed are not private rights of property, but are a part of the public rights which are shared in common, although used and enjoyed in different ways by the different members of the public who pass through a street, or whose property is carried through it. These public rights are primarily subject to the regulation and control of the Legislature which represents the public. This regulation and control is usually delegated to the local authorities by general laws, and sometimes by special laws. But the Legislature remains all the time the supreme authority in regard to all public rights and interests. The authority which it delegates, it may at any time resume, and then it may exercise it as it deems best. . . . All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property."

In *Boston Electric Light Co.* v. *Boston Terminal Co.*, 184 Mass. 566, in which the question was whether the same statute considered in the case next above cited was constitutional because it gave no damages for the conduits, wires, and other personal property of an electric lighting company placed in the street and rendered useless by the discontinuance thereof, Knowlton, C. J., speaking for the Court, and declaring the statute constitutional, said, page 569:

"Under our system of laws, the fee remains in the original owner or his successors in title, and the land may be used by him in any way that is not inconsistent with the rights of the public under the easement acquired by them when the street was laid out. Upon a discontinuance, the easement is terminated and the entire estate reverts to the owner of the fee."

Having stated that companies placing wires, conduits, or similar things in public streets do so under a revocable license, he added, page 570:

"This construction of the statute is in accordance with the general policy of our law in regard to this easement of the public. . . . The contention that the right of revocation reserved by the ordinances and the permit to the city council cannot be exercised by the Legislature is without foundation. The Legislature is the supreme authority in regard to public rights in the streets and highways."

In *Opinion of the Justices*, 208 Mass. 605, in affirming the constitutional power of the Legislature to permit cities or towns to grant revocable permits or licenses to connect by bridge premises on opposite sides of a public highway, and to charge rent therefor, it is said, page 606:

". . . And the Legislature may require the payment of a rent to the city or town for the slight impairment or limitation of the previously existing public rights," citing *Postal Telegraph Cable Co.* v. *Chicopee*, 207 Mass. 341.

In view of these statements it is unnecessary to discuss the technicalities (mostly historical) of the laws of Massachusetts relating to the construction of highways by towns and counties, or to elaborate the distinction between town-ways and county-ways.

Such distinctions are in no wise involved in this case.

(3) Such an interest of the Commonwealth in the streets of the Town of Essex is clearly sufficient to constitute the Commonwealth an owner of property within the decisions in *St. Louis* v. *Western Union Tel. Co.*, supra, and *Western Union Tel. Co.* v. *Richmond*, supra.

II

The Selectmen's denial of the petition of June 1, 1905, did not impair any Federal right of the plaintiff under the Act of Congress of July 24, 1866. (Assignments of Error, Nos. 1, 4, 5, 9, 10, 11.)

A. The only action of the Selectmen in reference to such a petition, that could violate the plaintiff's rights, would be action taken by them not individually, but as a body at an authorized meeting, and evidenced not by contemporaneous declarations or explanations of individual members of the board, but solely by the record required by the statute under which they acted (Stat. 1903, Chap. 237).

(*a*) As has been several times pointed out in this brief, the Selectmen in acting under this statute act not as agents of the town, but as a quasi-judicial body directly representing the Commonwealth. (See pp. 15, 18 *supra*.)

(*b*) "It is a well settled rule that when municipal councils or boards of any kind are called upon to perform legislative acts or acts involving discretion and judgment in administering the public affairs, they can only act at authorized meetings duly held,"—"The council or board must meet and act as a board or counsel," and "The members cannot make a valid

determination binding upon" the Commonwealth "by their assent separately and individually expressed."

2 Dillon Municipal Corporations, 5th Ed., Sec. 501.
Commonwealth v. *Inhabitants of Ipswich*, 2 Pick. 70.
Day v. *Green*, 4 Cush. 433, 438–439.
Ruggles v. *Inhabitants of Nantucket*, 11 Cush. 433, 436.
Shea v. *Milford*, 145 Mass. 528.

(*c*) This principle is specially emphasized in the very statute under consideration (Stat. 1903, Chap. 237), which requires a public hearing, written notice to abutters, and an endorsement by the town clerk "upon the order or specification of locations granted," and provides that "such certificates, specifications, and decisions shall be recorded in the records of the city or town." This implies formal action *strictissimi juris*.

(*d*) The only evidence of the action of such a body is the record required by law. This is plain from the language of the statute itself, especially the concluding sentence already quoted, "such certificates, specifications, and decisions shall be recorded in the records of the city or town." It is also settled by authority.

2 Dillon Mun. Corps., 5th Ed., Sec. 555.
Taylor v. *Henry*, 2 Pick. 397.
Manning v. *Gloucester Fifth Parish*, 6 Pick. 6.
Andrews v. *Boylston*, 110 Mass. 214.
Halleck v. *Boylston*, 117 Mass. 469.

In *Andrews* v. *Boylston*, supra, Mr. Justice Ames, speaking for the Court, said, page 215:

"The record is the appropriate evidence of the doings of the meeting, and it is not open to contra-

diction, enlargement or explanation by parol evidence."

In *Halleck* v. *Boylston*, supra, Mr. Justice Endicott, speaking for the Court, said, page 470:

> "The record of the proceedings of a town meeting is conclusive in relation to all business there transacted, and cannot be varied or controlled, and omissions therein cannot be supplied by parol evidence. This general rule also applies to the records of parishes, school districts, and similar organizations, and the reasons for the rule are fully stated in numerous decisions of this court."

(*c*) It needs scarcely to be argued that any evidence tending to contradict, enlarge, or explain the recorded vote of the Selectmen, Exhibit J (p. 52), even though admitted without objection, is entirely immaterial and has no probative force, a point apparently overlooked by the learned Judge in the court below.

Buttrick Publishing Co. v. *Fisher*, 203 Mass. 122, 133.
Farquhar v. *Farquhar*, 194 Mass. 400, 404.
Mears v. *Smith*, 199 Mass. 319, 322.
Black v. *Bachelder*, 120 Mass. 171.

B. If proposition *A*, *supra*, is sound, then the Selectmen's denial of the petition of June 1, 1905, could not possibly impair any right of the plaintiff; for—

(*a*) The recorded vote was (Exhibit J, p. 52), "Voted not to grant a location for poles and wires to the New England Telegraph Company of N. Y."

(*b*) This vote, however arbitrary and unreasonable, had relation solely to the petition of another company, and not to any petition of the plaintiff.

C. Even if, however, the petition of June 1, 1905, is regarded as the petition of this plaintiff, as Judge Dodge regarded it, then under the statute from which the Selectmen derived their powers to act at all, they had no jurisdiction to grant the petition; for—

(*a*) It has been held that the statute from which the only power of the Selectmen to act in this matter was admittedly derived (Rev. Laws, Chap. 122, Sec. 2, as amended by Stat. 1903, Chap. 237) must be strictly construed, and cannot be extended by implication.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Commonwealth v. *Boston*, 97 Mass. 555.

(*b*) Under this statute, as has been shown (pp. 18–20 *supra*), the jurisdiction of the Selectmen to grant original locations and specifications is strictly conditioned upon application being made by the company before the actual occupation of the streets and construction of the lines.

(*c*) If the petition is construed as a petition for a relocation rather than for an original location, the Selectmen were equally without jurisdiction to grant it. For their power to grant relocations depends wholly upon the prior existence of a legal location. This construction is required by the use of the word "location" itself in the clause of Stat. 1903, Chap. 237, reading: "After the erection of the lines the . . . selectmen may direct any alteration in the location," etc. The word "location," as has been shown, means an original legal right to occupy. The phrase "after the erection of the lines" plainly means after the legal erection of the lines. The "erection" referred to is the same erection that is referred to in the first part

of the statute in the sentence, "Any company . . . desiring permission to erect poles," etc., and is the same erection that is referred to in the subsequent phrase, "*once erected under the provisions of law.*" In other words, the statute was not intended to give to the Selectmen the power to legalize a physical occupation originally illegal; but merely the power to alter a legal location.

(*d*) If it is suggested that although the petition itself uses the word "location" (pp. 5–6; Exhibit I, p. 51), and although the company in the portion of its answer (p. 16) already quoted refers expressly to Stat. 1903, Chap. 237, as the provision of law involved, yet the petition may be treated as filed not under this statute at all, but under Rev. Laws, Chap. 25, Sec. 54, the answer is that, as already pointed out, selectmen have no jurisdiction to act under that statute until the company has complied with the statute governing locations and relocations, namely, Stat. 1903, Chap. 237.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Commonwealth v. *Boston*, 97 Mass. 555.

(*e*) If it is urged that the absence of jurisdiction in the Selectmen required technically a dismissal rather than a denial of the petition, the answer is that that is true but immaterial.

D. If the Selectmen's denial of the petition (assumed for purposes of argument to be the petition of the plaintiff) was required by a state statute which was reasonable on any view of the meaning of the Act of Congress of July 24, 1866, then that denial could not possibly impair any right of the plaintiff under the Act of Congress.

(*a*) If the contrary were the case, we should have the singular situation of a local statutory tribunal being compelled to violate the state statute from which it derived all its powers, and to usurp authority not granted to it, in order to prevent a telegraph company from occupying the streets of a town under the Act of Congress without being subject to any regulation at all as to what streets it should occupy, what part of the streets it should occupy, what kind of poles it should use, and what should be the height of its wires. In *Laclede Gas Light Co.* v. *Murphy*, 170 U. S. 78, Mr. Chief Justice Fuller, speaking for the Court in reference to certain statutes of Missouri and ordinances of the city of St. Louis forbidding any company to place wires under ground in any city until it had first obtained the consent of the city through the municipal assembly, and in reference to a company which was endeavoring to obtain a mandamus to compel the street commissioner of St. Louis to issue a permit to open the streets, when the company had not first complied with the statutes, said, page 99:

> "The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform."

(*b*) If the plaintiff's federal right was subject to the reasonable regulative power of the state, the plaintiff obviously could not enlarge its federal right simply by so acting as to prevent the jurisdiction of the appropriate state tribunal from attaching.

It may be urged that what this argument really means is that the plaintiff cannot obtain a legal location in Essex without first removing its lines, or ob-

taining an act of the Massachusetts Legislature validating its long-continued tortious occupation of the public highways in that town; and that this would be great hardship on the plaintiff. The town need not fear this contention; for if the logic of the situation imposes hardship upon the plaintiff, who is to blame for that hardship? Not the town, because at no time during the whole period of the company's occupation had the town as a corporate body any right whatever under the laws of Massachusetts to legalize the nuisance. Not the Selectmen, because under the strict limitations of the statute they also have been powerless to legalize the nuisance. Not the Commonwealth of Massachusetts, because its delay in prosecuting a continuing crime is not equivalent to a pardon. The blame lies wholly upon the company itself as an original and continuing wrong-doer, and the hardship of complying at this late day with the reasonable laws of the Commonwealth can hardly be urged in this tribunal as a reason for setting those laws aside, or enjoining their enforcement.

In *Commonwealth* v. *Boston*, 97 Mass. 555, several times previously cited in this brief, a far greater hardship was imposed upon the telegraph company for a failure to obtain an original legal location than would be imposed in this case.

E. And even if we assume for purposes of argument not only that the petition of June 1, 1905, was the petition of the plaintiff, but also that the action of the Selectmen may be ascertained not merely from their records, but also from the contemporaneous declarations and explanations of individual members of the board, still no impairment of any federal right of the plaintiff under the Act of Congress of July 24, 1866, is shown; for—

(*a*) The fair import of the evidence is not that the Selectmen declared that they would never under any circumstances grant this plaintiff any location in the town, but merely that they would not grant the plaintiff a location so long as its violation of law continued, *i.e.*, until by removing its lines from the town it had put itself in a position to invoke the jurisdiction of the Selectmen.

(1) The evidence concerning the contemporaneous declarations of the Selectmen consists of the letter of July 11, 1905, of their chairman, Aaron Cogswell, to the plaintiff (Exhibit B, p. 6), and his testimony (pp. 44–45); and the testimony of the plaintiff's superintendent, Pillsbury (pp. 30–31), and of the plaintiff's foreman, Ryan (pp. 37–38); of Sargent, the town clerk (p. 40), and of the Selectman Kimball (p. 43).

(2) This is the construction put upon the evidence by Judge Dodge. He says (p. 23) that the town

> "justifies its attempt to exclude the plaintiff, or stop the operation of its line within Essex, only by the claim that the company has never obtained a location for the line from the Town authorities, according to the state statute."

And, page 20:

> "At a subsequent conference between the Selectmen and representatives of the plaintiff, it was stated to the plaintiff, by or on behalf of the Selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the Town."

And, page 21:

> "The cross bill asks that the plaintiff be ordered to remove its poles, and for an injunction forbidding the plaintiff to use its line within Essex for the purposes of its business until it shall have first obtained a franchise from the Board of Selectmen, as provided by the laws of Massachusetts."

(*b*) But if, as is the case, the statute under which the Selectmen were acting was itself not a violation of the Act of Congress, then declarations by the Selectmen which amounted to no more than this, that they would never act under the statute except upon the conditions prescribed by the statute for conferring jurisdiction upon them, could not relieve the plaintiff from the necessity of putting itself in a position to comply with those conditions.

(*c*) Again, no declarations of the Selectmen, however sweeping or unwarranted, could bind their successors in office, or impair the plaintiff's rights by anticipation.

Littlefield v. *Boston & Albany R.R.*, 146 Mass. 268.

Hewitt v. *Canton*, 182 Mass. 220, 223.

N. Y., N. H. & H. R.R. Co. v. *New Rochelle*, 60 N. Y. Supp. 904.

Non constat that these Selectmen would not have changed their attitude if a petition over which they had jurisdiction had been presented to them.

Gundling v. *Chicago*, 177 U. S. 183.

(*d*) Finally, if the Act of Congress of July 24, 1866, is construed as conferring no positive right upon any telegraph company to occupy public highways in a state without first obtaining the permission of the state as owner of the soil or of the public easement of travel

therein, regardless of whether such consent is reasonably or unreasonably withheld, then it makes no difference how sweeping the declarations of these Selectmen were as to their purposes or intentions, or whether or not they had jurisdiction under the state statute to entertain the petition of June 1, 1905, or whether, having such jurisdiction, they reasonably or unreasonably refused to grant the petition.

For, as has been pointed out in an earlier part of this brief (pp. 28–40 *supra*), if in construing this statute the state as the owner of the easement of public travel is to be put upon an equal footing with a railroad company, or with an individual owner of private property, then the company can no more, under the Act of Congress of July 24, 1866, force the state to part with its property rights because its terms or its refusal to treat happen to be unreasonable, than could a company force a private owner to permit it to put its poles through his front yard because he unreasonably refused to permit such use of his yard on any terms whatsoever. Such, we submit, is the necessary result of the decision of this Court in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92.

III.

The threats of the Selectmen furnish the company no ground whatever for equitable relief in a Federal court, either against the Town, or against the Selectmen themselves. (Assignments of Error, Nos. 1, 11.)

A. In the first place, whether the Selectmen threatened merely to institute legal proceedings, or to resort to physical force, this plaintiff as an open and persistent violator of the

state laws is not entitled to invoke the assistance of a court of equity at all, especially to enable it to continue such violation.

Cragin v. *Powell*, 128 U. S. 691.
Roberts v. *Northern Pacific R.R.*, 158 U. S. 1, 13.
Atwood v. *Fisk*, 101 Mass. 363.
Lawton v. *Estes*, 167 Mass. 181.
Snow v. *Blount*, 182 Mass. 489.
Downey v. *Gove Co.*, 201 Mass. 251.
Lyons v. *Elston*, 211 Mass. 478.
Sunset Tel. & Tel. Co. v. *Pomona*, 164 Fed. 561, 580; affirmed 224 U. S. 330.

In *Atwood* v. *Fisk*, supra, the similar principle of the Roman law is referred to as expressed in the maxim "Procul, o procul este, profani!"

In *Sunset Tel. & Tel. Co.* v. *City of Pomona*, supra, Wellborn, J., said, page 580:

> "As complainant is unlawfully maintaining its intrastate and local lines in the streets of Pomona without right and against the city's consent, it will not be heard to say that the removal of such unlawful obstructions was or is otherwise informal. A suitor must come into a court of equity with clean hands, and cannot, in such a forum, protect an unlawful occupancy of streets by asserting that such occupancy is being informally or irregularly disturbed."

B. Even if we adopt an interpretation of the language of the Selectmen most favorable to the plaintiff, as does Judge Dodge (p. 20), and treat their threat as a threat to "prevent construction work by force, if necessary," rather than as a threat to prevent it by a resort to legal proceedings, still the District Court had no right to make those threats the ground for an injunction either against the town or against the Selectmen; for—

(*a*) The District Court as a federal court of equity could give relief in this case only for the violation of a federal right. That is the ground and the only ground upon which jurisdiction is claimed in the bill. The averment of the bill is that (p. 2),

> "The matter in dispute in this suit largely exceeds, exclusive of interest and costs, the sum or value of $2000; and that, as hereafter more fully set forth, *it arises under the constitution and laws of the United States*, etc."

No diversity of citizenship exists or is alleged.

(*b*) But although this allegation doubtless gave the District Court jurisdiction to determine whether the federal right existed, and also whether it had been violated, the District Court had no jurisdiction to decree relief to the plaintiff unless and until it appeared that the federal right not only existed, but also had been violated.

The Fair v. *Kohler Die Co.*, 228 U. S. 22.

(*c*) Unless at the time these threats were made the plaintiff had a right to maintain, repair, or reconstruct its lines by virtue of the Act of Congress of July 24, 1866, then no threat of the Selectmen to prevent the doing of any of those things, however violent the threat may have been, could violate the plaintiff's federal rights. It has already been shown that whether we adopt one or the other of the two possible constructions of the Act of Congress of July 24, 1866, the plaintiff at the time the threats were made was not in the exercise of any federal right. It is wholly immaterial whether the Selectmen's threats were declarations of an intention to violate some state law against assault and battery, breach of the peace, rioting, etc., or not.

(*d*) It may be added that the threats of the Selectmen would in no event warrant an injunction against the Town, even in a court of general equity jurisdiction. For if it be conceded that the Selectmen in threatening physical force were acting not in their capacity as public officials of Massachusetts, but in their capacity as agents or officers of the Town, still they acted *ultra vires*. The limits of their authority are stated in the following language in the answer of the town (p. 10):

> "It is admitted that the town, through its Selectmen, have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town. The defendant denies that any threat was made that the plaintiff would be prevented from attempting to relocate any of its poles in said highways, or that any force was used to stop said relocation. It is admitted that the Selectmen of said Town of Essex forbade the plaintiff from resetting its poles, from changing the location of its poles, from restringing its wires, or from doing business of any sort in said town on the highways of said town until first a franchise was obtained therefor in accordance with the laws of the Commonwealth of Massachusetts."

This language shows no authorization by the town to the Selectmen to use physical force. It implies simply a determination to resort to legal proceedings. There is nothing whatever in the record throwing any further light upon the scope of the authority of the Selectmen to act for the town in this matter. It will hardly be contended that *virtuti officii* they had authority from the town to resort to assault and battery. Moreover, it appears plainly enough from the testimony that the Selectmen themselves had in mind simply the institution of legal proceedings, and not physical force. (See the testimony of Ryan, p. 38; Kimball,

p. 38; Cogswell, p. 44.) The only witness who talks about physical force is the company's superintendent, Pillsbury (pp. 30–31).

But if, nevertheless, the inference is drawn that the Selectmen did threaten physical violence, while that might justify a state court in making a decree against them as principals, it would not justify a decree against the town as their principal.

IV.

Even if the preceding three main propositions were all unsound, the final decree should nevertheless be modified by inserting after the word "complainant" in the nineteenth line from the beginning, the words:

> "provided that nothing herein contained shall be construed to prohibit a reasonable exercise by the Board of Selectmen of the town of Essex of the regulative powers concerning telegraph lines conferred upon said Selectmen as a public board by the laws of the Commonwealth of Massachusetts now or hereafter in force, or any action by the defendant, its officers, agents, and employees, authorized or required by said laws." (Assignments of Error, Nos. 1, 4, 5, 8, 11.)

A. The significance for present purposes of the assumption that the three preceding main propositions are unsound is that the Act of Congress of July 24, 1866, conferred upon the plaintiff a positive right to occupy the public highways in the town of Essex, subject only to the reasonable regulative action of the Selectmen as a public board under Stat. 1903, Chap. 237; that the Selectmen under that statute were not ousted of jurisdiction to entertain the petition of June 1, 1905, by the fact that the plaintiff had originally constructed and for a long time main-

tained its telegraph line on said streets without obtaining the "writing" referred to in said statute; that the action of the Selectmen in denying said petition was arbitrary and unreasonable, and constituted a violation of the plaintiff's rights under the Act of Congress, aggravated by the Selectmen's subsequent threats of physical force; and that the town as a corporate body had adopted the act of the Selectmen performed in their capacity as a quasi-judicial public body in denying the petition, as well as their subsequent declarations and threats, in whatever capacity such declarations and threats were made. These are the propositions which the plaintiff must maintain in order to entitle itself to a decree against the town. These are the propositions which the defendant has controverted under the three preceding headings of this brief.

B. The terms of the injunction are plainly open to a construction which would deprive the Commonwealth of Massachusetts of all power in the future to impose any regulations at all upon the lines of this plaintiff within the town of Essex.

(*a*) While it is true that the injunction runs only against "the defendant, its officers, agents, and employees" (p. 18), and that in granting locations and relocations, as well as in establishing regulations concerning the other particulars mentioned in Stat. 1903, Chap. 237, the Board of Selectmen act not as officers, agents, or employees of the town, but as an independent public body directly representing the Commonwealth (*Young* v. *Yarmouth*, 9 Gray, 386, and cases cited p. 15 *supra*); yet the language of the injunction is plainly susceptible of a broader construction which would reach the Selectmen as agents of the Town. For the Selectmen are in a variety of matters officers and agents of the town.

Deane v. *Randolph*, 132 Mass. 475.
Hawkes v. *Charlemont*, 107 Mass. 414.

And if at some future time, acting under the last part of Stat. 1903, Chap. 237, or its present substitute, Stat. 1911, Chap. 509, Sec. 2, the Selectmen should "direct an alteration in the location of the poles, piers . . . or in the height of the wires," or "by order authorize" another company "to attach its wires and fixtures to" the poles of the plaintiff company, or "by order grant to" another company a "joint or identical location for the erection or construction of poles . . . to be owned and used in common by them," they might do so at the peril of an attachment for contempt on the ground that the injunction was aimed at the persons who might from time to time hold the position of Selectmen regardless of the capacity in which they might be acting. And this danger is increased by the sweeping language of the latter part of the injunction, enjoining

> "the defendant, its officers, agents and employees, . . . *from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant*";

and by the use of the words "location" and "relocation" in the body of the injunction. The use of these words might well be made the basis for the claim that the purpose of the injunction was to restrain such officers and agents of the town as had the right under the state statutes to deal with locations and relocations, whether in so dealing they were acting as agents or officers of the town or not. And the fact that under the state statutes no person acting in the capacity of officer or agent of the town has anything to do with locations or relocations of telegraph lines, would afford strong ground for the contention that the words "officers" and "agents" as used in the injunction were

intended as a designation of persons, and not of any particular capacities.

(*b*) But an injunction against a quasi-judicial body established by the laws of a state, restraining them not from enforcing any particular order which may be deemed in violation of some federal right, but from exercising their functions at all, is an injunction against the state itself.

Cunningham v. *Macon & Brunswick R.R. Co.*, 109 U. S. 446.
Hopkins v. *Clemson College*, 221 U. S. 636, 642.

C. Even if such an injunction were not in violation of the Eleventh Amendment to the Constitution of the United States, so sweeping a prohibition would be far in excess of anything necessary to protect the rights of the plaintiff under the Act of Congress of July 24, 1866, even when construed as the plaintiff contends it should be construed. For we do not understand that the plaintiff contends (and certainly the contention, if made, would not be sustained) that the Act of Congress entirely exempts telegraph companies from all regulation by the states, or by subordinate tribunals of the state.

D. The injunction also plainly and unwarrantably deprives the town of a remedy expressly conferred upon it by the laws of the Commonwealth in case of a violation by any corporation of reasonable regulations made by the Selectmen under Rev. Laws, Chap. 25, Sec. 54.

(*a*) Section 54 has already been several times referred to (pp. 10–11, 14, 48 *supra*). Its material provisions are as follows:

"The selectmen may, within their respective towns . . . establish reasonable regulations for the erection and maintenance of all lines for the trans-

> mission of intelligence by telegraph or telephone, by electricity or otherwise . . . by every person having authority to place poles, wires, structures and other appliances for any purpose in or under public ways or places," etc.

This section, as already pointed out, is subordinate to the provisions of Stat. 1903, Chap. 237, and the "authority" referred to in it means the authority first obtained under that statute.

Met. Home Tel. Co. v. *Emerson*, 202 Mass. 402.

(*b*) Rev. Laws, Chap. 25, Sec. 55, provides a remedy for the violation of Section 54, the material language being:

> "The town shall forthwith in writing give notice in detail to the owner, constructor or person using any line therein which is constructed or maintained in violation of such regulations; and if thereafter such unlawful construction is continued, or if said lines are not within a reasonable time so altered as to conform to said regulations, the supreme judicial court or the superior court shall have jurisdiction in equity to enjoin the further progress of said work, or to order such line to be removed or altered at the expense of the owners, constructors, or persons using the same."

(*c*) But under the terms of this injunction it would plainly be a contempt of court for the town to institute proceedings in the state courts under Section 55, however high-handed or arbitrary the action of the plaintiff might be. On no possible theory of the meaning of the Act of Congress of July 24, 1866, can such an injunction be justified.

E. The decree also unwarrantably abrogates, so far as this particular line is concerned, the provisions of Rev. Laws,

Chap. 122, Secs. 16–23, both inclusive, which contain detailed requirements concerning the strength of wires and supports and the insulation thereof in towns for protection against fire, the marking of wires with the owner's name at different points, and the appointment by the selectmen of an official termed an inspector of wires to enforce these regulations; the conferring of jurisdiction in equity upon the Supreme Judicial Court and the Superior Court at the suit of the town to enforce the orders of the inspector; and similar provisions which it is unnecessary to refer to more in detail. The material portion of Section 18, however, is as follows:

> "A city shall, by ordinance, designate or provide for the appointment of an inspector of wires, and any town may, at an annual town meeting, instruct its selectmen to appoint such an inspector. Such inspector shall supervise every wire over or under streets or buildings in such city or town and every wire within a building which is designed to carry an electric light, heat, or power current, shall notify the person or corporation owning or operating any such wire whenever its attachments, insulation, supports, or appliances are improper or unsafe, or whenever the tags or marks thereof are insufficient or illegible, shall, at the expense of the city or town, remove every wire the use of which has been abandoned and every wire which is not tagged or marked as hereinbefore required, and shall see that all laws and regulations relative to wires are strictly enforced. A city or town may recover in an action of contract of the person or corporation owning any wire so removed the expense which it has incurred for the removal thereof."

Section 19 reads as follows:

> "The supreme judicial court or the superior court shall have jurisdiction in equity upon petition of the officer or inspector designated or appointed as aforesaid, to enforce the provisions of the three preceding sections and to restrain the use or maintenance

or to cause the removal of any wire, pole, or other support which is erected, maintained, or used in violation of the provisions of said sections."

It needs no argument to prove that a decree which renders it a contempt of a federal court for a town or its agent, the inspector, to enforce these two statutes, cannot be justified by the Act of Congress of July 24, 1866, and is a wholly unwarrantable invasion of the rights reserved to the Commonwealth of Massachusetts by the Constitution of the United States. A construction of the Act of Congress which permitted such a result would require a decision that the act itself was void.

F. The decree also unwarrantably hampers the town in protecting itself by ordinary equitable proceedings in the state courts, irrespective of the special statutes mentioned above, from the possibility of liability under Rev. Laws, Chap. 51, Sec. 18, to travellers for a defect in the highway in case this line should by reason of the company's violation of reasonable regulations become a defect.

(*a*) Rev. Laws, Chap. 51, Sec. 18, is as follows:

"If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient railing in or upon a way, causeway or bridge, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the county, city, town or person by law obliged to repair the same, he may, if such county, city, town, or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of a sufficient railing, recover damages therefor from such county, city, town or person; but he shall not recover from a county, city, or town more than one-fifth of one per cent of its state valuation last pre-

ceding the commencement of the action nor more than four thousand dollars, and no action therefor shall be maintained by a person whose carriage and the load thereon exceeds the weight of six tons."

(*b*) The law of the Commonwealth has always been that in the case of obstructions of a highway of such a character that the town may sustain special damage thereby, particularly by being held liable for a defect under the statute above quoted, the town by its selectmen may maintain a bill in equity to abate the nuisance, even though the ownership of the easement of public travel is in the state, and the general remedy for obstructions thereof is by indictment or information by the Attorney General representing the Commonwealth.

Springfield v. *Connecticut River Ry. Co.*, 4 Cush. 63.
Winthrop v. *Farrar*, 11 Allen, 398.
Needham v. *New York & New England R.R.*, 152 Mass. 61.

There are similar decisions in other jurisdictions.

Easton R.R. Co. v. *Greenwich*, 25 N. J. Eq. 565, 567.
Rio Grande R.R. Co. v. *Brownsville*, 45 Tex. 88, 92.
Johnston v. *Providence R.R. Co.*, 10 R. I. 365.
Moundsville v. *Ohio River R.R. Co.*, 37 W. Va. 92, 100.
Detroit, etc., R. Co. v. *Macomb*, 109 Mich. 371.

(*c*) It is plain that the terms of the injunction are so sweeping as to render the institution of such litigation by the town or its agents, the selectmen, a contempt of court, no matter how gross and long continued might be the violation by the plaintiff of reasonable regula-

tions requiring or prohibiting "changes by the complainant."

G. The limitation of the decree by the language suggested in the proposition is the least that is required to render the decree valid on any theory of the scope of the Act of Congress of July 24, 1866. The insertion suggested qualifies the injunction simply by saving the present and future laws of Massachusetts on the subject. None of the present laws of Massachusetts concerning the regulation of telegraph lines have been attacked or can be successfully attacked as in violation of the Act of Congress or of the Constitution of the United States. If the Commonwealth should in the future pass laws invading some federal right, the validity of such laws ought to be tested, not upon an application for contempt in this case, but in independent proceedings. The effect of the insertion is practically to make the injunction applicable only to the employment of physical force, or other physical interference, and that is all that should be enjoined on any arguable theory of the meaning of the Act of Congress.

WILLIAM G. THOMPSON,
GEORGE E. MEARS,
Counsel for the Town of Essex.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE TOWN OF ESSEX FILED BY LEAVE OF COURT ON THE QUESTION OF JURISDICTION UNDER SEC. 238 OF THE JUDICIAL CODE.

STATEMENT OF THE QUESTION.

The question has been raised whether there was any right under Sec. 238 of the Judicial Code to take this appeal direct from the District Court to the Supreme Court. That right exists

> "in any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction

> alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The only part of Sec. 238 material for present purposes is the following:

> "In any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States . . . is drawn in question; and in any case in which the . . . . law of a state is claimed to be in contravention of the Constitution of the United States."

The original federal jurisdiction of the Circuit Court, from which this case was transferred to the District Court, was based upon the allegation of the bill (Rec. p. 2)

> "that the matter in dispute in this suit largely exceeds, exclusive of interest and costs, the sum or value of $2,000; and that, as hereafter more fully set forth, it arises under the Constitution and laws of the United States."

The bill alleges no claim arising directly under the Constitution of the United States, but does claim rights under two laws of the United States; namely, the Acts of Congress of July 24, 1866, and March 1, 1884, averring that the first law authorized the appellee to occupy with its poles and wires post roads of the United States, and that the second law made three highways in the town of Essex post roads within the meaning of the first law (Rec. p. 2). The bill further alleges (Par. VI, pp. 4–5) that the laws of Massa-

chusetts do not permit a town to do what the bill elsewhere (Par. VI, p. 5) alleges the Selectmen of Essex have done; namely,

> "to refuse to allow a telegraph company to make changes, repairs, and resetting in its line necessary to keep said line in a state of efficiency and safety, nor to refuse absolutely to allow a telegraph company to relocate its line; or to refuse such company any location whatsoever."

In other words, the bill in substance alleges that the town of Essex, through its Selectmen, has attempted to deprive the appellee of rights granted to it by the two Acts of Congress, and that in so doing the town and the Selectmen acted without warrant of any valid state law. The bill treats all the acts of the Selectmen complained of as acts done on behalf of the town, and makes no discrimination between their act in refusing the location or relocation, which, as shown in our original brief, was done by the Selectmen not as agents of the town, but as a branch of the state government, and their threats and other oral declarations, which, whether binding on the town or not, were not acts performed by the Selectmen in their quasi judicial capacity as representatives of the state.

The town's answer in the following language (Par. 3, p. 8) puts directly in issue, (1) the appellee's construction of the two Acts of Congress; (2) the appellee's construction of said Massachusetts statutes; and (3) the validity of the two Acts of Congress under the United States Constitution, if the appellee's construction of them is correct:

> "The defendant denies that the Act of Congress of 1866 authorized the plaintiff to construct, maintain, and operate its line of telegraph over the roads and streets of the defendant without first having obtained a franchise from its board of selectmen in accordance with the statutes of the Commonwealth of Massachusetts; and the defendant further denies that the act of March 1, 1884, made all public roads subject

to the use of the plaintiff for its business purposes without any grant from the legally constituted officers of the defendant or the legislature of the Commonwealth of Massachusetts. The defendant denies that the act of March 1, 1884, gave the plaintiff any rights or privileges. The defendant avers that said act only declared what highways should be used as post routes. *The defendant denies that Congress has the authority under the Constitution of the United States to grant to the plaintiff any rights in the public highways of the defendant.* It further denies the authority of Congress under the Constitution of the United States to grant to the plaintiff any authority to use the public highways of the defendant without first having obtained the permission of the duly authorized officers of the defendant, or the authority to take said streets or such rights in said streets by the right of eminent domain granted by the Massachusetts legislature; that Congress has no right to grant to the plaintiff rights to use its public town or streets without some provision for compensation. . . . This defendant denies that the United States has any interest whatever in these streets or highways. It denies that the United States ever expended any sum of money or performed any services or contributed any valuable thing toward the construction or maintenance of these highways, or that the United States has any control whatever over these highways which will enable Congress to grant to the plaintiff any rights therein to do its private business."

The answer further (Par. 4, p. 10) refers to the statutes of Massachusetts preventing the obtaining of any prescriptive right or easement in public streets by long continued illegal occupation; and concludes (Par. 6, p. 11) with an averment that the appellee

> "never had any rights whatsoever in the highways of the town of Essex, either by grant from Congress, from the General Court of Massachusetts, or from the Selectmen of the town of Essex, or any other legally constituted authority";

but that the appellee originally occupied the highways without obtaining from the Selectmen the written specifications required by Pub. Stats., Chap. 109.

Substantially the same allegations are contained in the town's cross bill (Rec. pp. 12–14). The appellee's answer to the cross bill (Par. 4, p. 15) "denies that the Government of the United States . . . has no interest in the highways," and (Par. 5) no interest in the complainant; and further denies (Par. 7, p. 16) that before it could obtain any rights in the streets "it was obligatory upon the complainant to obtain the consent of the Selectmen of the town of Essex in accordance with the statutes of the Commonwealth," specifying (Par. 10, p. 17) Revised Laws, Chap. 122, Sec. 26, as the applicable state law.

Judge Dodge held with the appellee that, if these streets were post roads, the Act of Congress of July 24, 1866, gave the appellee the absolute right to occupy them in the sense that it could not be excluded by the state laws or action of Selectmen authorized by those laws (Rec. pp. 22-23); also that the Act of Congress of March 1, 1884, making these streets post routes, also made them post roads, and in so operating was "an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish post offices and post roads"; declared (p. 22) that

> "The legislation of Congress so far as it has gone is supreme because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service";

and that the appellee "holds its privilege to run its lines through the post roads referred to under the laws of Congress"; does not discuss the construction of the state statutes requiring such companies to obtain a written specification, but by necessary implication declares them inoperative if they permit a refusal of the specification by

the Selectmen (Rec. p. 23, fol. 33); and made a final decree in favor of the plaintiff.

On this state of the record we maintain the following propositions:

I. This is a case in which the constitutionality of two laws of the United States were drawn in question within the meaning of Sec. 238 of the Judicial Code, namely, the Act of July 24, 1866, and the Act of March 1, 1884.

II. This is a case in which both the construction and application of the Constitution of the United States were involved within the meaning of Sec. 238 of the Judicial Code.

III. This is a case in which the law of a state was claimed to be in contravention of the Constitution of the United States within the meaning of Sec. 238 of the Judicial Code.

ARGUMENT.

I.

This is a case in which the constitutionality of two laws of the United States were drawn in question within the meaning of Sec. 238 of the Judicial Code, namely, the Act of July 24, 1866, and the Act of March 1, 1884.

A. All that must appear in order to show that the constitutionality of a law of the United States was "drawn in question" within the meaning of Sec. 238 of the Judicial Code is that at some stage of the trial in the District Court, and by one party or the other, a question of the constitutionality of a law, not previously decided by the Supreme Court, was seriously presented to the District Court.

Loeb v. *Columbia Township Trustees*, 179 U. S. 472.
Arkansas v. *Schlierholz*, 179 U. S. 598, 601.
American Sugar Refining Co. v. *United States*, 211 U. S. 155.
Rakes v. *United States*, 212 U. S. 55, 58.
McFadden v. *United States*, 213 U. S. 288.
Kaufman Co. v. *Smith*, 216 U. S. 610.
City of Memphis v. *Cumberland Co.*, 218 U. S. 624.

In *Loeb* v. *Columbia Township Trustees*, supra, it was held that the opinion of the Court below transmitted with the record might be examined to ascertain whether either party claimed that a state statute was in contravention of the Constitution of the United States. There seems no reason for drawing a distinction between examining the opinion below for the purpose of seeing

whether either party made a certain "claim," and examining it for the purpose of seeing what was "drawn in question" by either party.

In *Memphis* v. *Cumberland Co.*, supra, it is said by Mr. Justice Day, speaking for the Court:

> "Under Section 5 of the Court of Appeals Act the right to come to this court by direct appeal is given in any case in which it is 'claimed' that a constitution or law of a state is in contravention of the Constitution of the United States. It is thus apparent that the claim to give a right of appeal under this section need not necessarily be in the pleading of the party invoking the jurisdiction of the court. It is sufficient if such right is duly claimed in the case. The statute is silent as to how this claim shall be made."

The same rule must apply to the determination of whether the constitutionality of a law of the United States has been "drawn in question."

B. In the case at bar the true test of whether the constitutionality of a law of the United States was "drawn in question" is fully satisfied, *i.e.*, it appears both from the appellant's answer and also from the opinion of Judge Dodge that the question of the constitutionality of the Acts of Congress of July 24, 1866, and of March 1, 1884, was seriously insisted upon by the appellant in the court below. And it is also true that, while the constitutionality of those statutes may have been assumed by this Court, the question has never been directly presented to and decided by this Court.

(*a*) While the town denied the appellee's interpretation of the two laws, the town emphatically insisted, both in its answer and in its cross bill, upon the unconstitutionality of those two laws if they were intended to confer the right claimed by

the appellee, namely, the right regardless of state statutes to occupy in the first instance highways of a state in which the United States had no property interest. See the town's answer (Par. 3, p. 8), cross bill (Pars. 5 and 7, p. 13), referred to and in part quoted in the introduction to this brief. The fact that the construction of the Act of Congress was also drawn in question is immaterial so long as that was not the only question relating to the Act which was drawn in question.

Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397.

In that case Mr. Justice Harlan, speaking for the Court, said (p. 407):

> "But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the *construction* of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court."

In *Savage* v. *Jones*, 225 U. S. 501, which was an appeal from the Circuit Court directly to the Supreme Court, the appellant attacked as unconstitutional a state statute, but alleged in the court below that if the statute were properly construed it would not be unconstitutional, averring, however, that the proper state officer had construed it in a manner to make it unconstitutional. Mr. Justice Hughes, speaking for the Court, said (p. 519):

> "A general demurrer for want of equity was

> sustained, and in view of the substantial character of the contention the case must be regarded as one in which the law of a state is claimed to be in contravention of the Constitution of the United States."

In the town's answer in the case at bar the reference to compensation unmistakably identifies Article 5 of the Amendments to the Constitution of the United States as the constitutional provision with which the laws of the United States are in conflict. The references in the answer to the Act of March 1, 1884, also make it clear that the town desired to draw in question the right of Congress to pass such an act under the power granted by Article 1, Section 8, to establish "post offices and post roads," on the ground that, as construed by the appellee, it involved the exercise of a power not delegated to the United States by that provision of the Constitution, and thus in violation of the 10th Amendment.

(*b*) It appears plainly in the opinion of Judge Dodge that he regarded the constitutionality of these two Acts of Congress as having been "drawn in question." He adopted the construction of them upon which the bill was based, and declared that they were (p. 22) "an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish post offices and post roads"; and that (p. 22)

> "The legislation of Congress, so far as it has gone, is supreme; because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service."

These expressions refer unmistakably to the issue of constitutionality presented by the portion of the

defendant's answer to which we have referred. But even if Judge Dodge had omitted entirely to discuss the question of the constitutionality of the laws, the question would none the less have been drawn in question by the appellant's answer and would have been none the less essentially involved in the decision of the case.

(*c*) Far from being a frivolous question, or one merely of words, the question of constitutionality thus drawn in question was of the most serious and substantial character. It has never been directly decided by this Court. It is unnecessary merely for the sake of proving a negative to cite again here the decisions of this Court dealing with these two statutes. They are collated and analyzed on pages 28–38 of our original brief. They all deal with the *construction* and not with the constitutionality of these statutes. No case has yet been presented to this Court in which the Act of July 24, 1866, has been held by the court below to apply to a situation like the situation presented in the case at bar, that is to say, to legalize an original physical occupation of the highways of a state made without coming to terms with the state, either directly or through the appropriate administrative or quasi-judicial department, and in defiance of the laws of the state. This is not the first instance, nor will it be the last, of a statute remaining on the statute books for years, and repeatedly construed and applied to situations to which it could constitutionally apply, and assumed to be constitutional because the full scope of its possible operation had never been disclosed in any particular litigated case. So far as this appellant is concerned, and until the final decree is reversed, the Act of July 24, 1866, at the present time means what the District Court has declared it to mean.

If it means that, the appellant claimed below and claims here that it is unconstitutional.

C. The question of the constitutionality of the two laws of the United States thus presented in the court below has been properly reserved for this Court by appropriate assignments of error. We do not understand this proposition to be disputed. The assignments of error are Nos. 6, 7, 10, and 11. The argument that the laws as construed by the District Court are unconstitutional is found on pages 38 and 53 of our original brief. It cannot be fairly suggested that, because we have devoted the larger part of our original brief to advocating a construction of these two laws different from the construction placed upon them by Judge Dodge, and one that would render them constitutional, we have therefore abandoned our claim made in the court below, and repeated in the assignments of error, that, if our construction is not adopted, the laws are unconstitutional.

II.

This is a case in which both the construction and application of the Constitution of the United States were involved within the meaning of Sec. 238 of the Judicial Code.

A. All that it is necessary to show in order to make a case "that involves the construction or application of the Constitution of the United States within the meaning of Sec. 238 of the Judical Code" is that a substantial question concerning the construction or application of the Constitution was presented by either party to the District Court at some stage of the proceedings prior to the decision in that court. This proposition is supported by some if not all of the cases

cited under Proposition I-*A*, *supra*. In addition we refer to *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U. S. 226, 231, and to the language of Mr. Justice White in the dissenting opinion in *Memphis* v. *Cumberland Telephone Co.*, 218 U. S. 624, 638. The decisions of this Court are clearly to the effect that whether a case "involves the construction or application of the Constitution of the United States," in the sense required to give this Court appellate jurisdiction, does not depend, like the question of original federal jurisdiction, upon the point whether the plaintiff's first pleading contains a distinct claim under the Constitution of the United States, but may be answered in the affirmative where it distinctly appears from any part of the record that either party presented for the consideration of the court below a substantial question involving the construction or application of the Constitution of the United States, and logically connected with the issues in the case. In other words, there appears to be little if any distinction between the significance of the three expressions "involves," "drawn in question," and "claimed," as used in Sec. 238.

B. The case at bar meets the test of "involving the construction or application of the Constitution of the United States." The allegations of the appellant's answer already referred to presented as clearly a question involving the construction and application of the Constitution of the United States as of the constitutionality of the two laws of the United States to which they refer. For to determine that a law of Congress is unconstitutional necessarily involves an application of the Constitution, and generally involves a construction of it. The appellee's answer to the cross bill presents with equal clearness questions involving the construction and application of the Constitution of the United States. The answer (Par. 4,

p. 15) "denies that the Government of the United States has no interest in the highways" and no interest in the complainant. But whether the Government of the United States had an interest in the highways depended in the last analysis upon the construction and application of Article 1, Section 8, of the Constitution, giving Congress the power to establish post offices and post roads.

Judge Dodge, in sustaining the constitutionality of the two Acts of Congress in question, says (p. 22):

> "That 'post routes' as there used means anything different from 'post roads,' I am unable to believe, in view of the decisions which have treated this enactment as an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish post offices and post roads."

And he adds that

> "There can be no doubt that in the case of a company like the plaintiff, engaged in transmitting interstate, international, and Government messages, the legislation of Congress, so far as it has gone, is supreme; because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service."

He here applies also the interstate commerce clause of the Constitution.

III.

This is a case in which the law of a state was claimed to be in contravention of the Constitution of the United States within the meaning of Sec. 238 of the Judicial Code.

In view of the authorities heretofore cited concerning what must appear in order that the case may be one in

which "the law of a state is claimed to be in contravention of the Constitution of the United States," all we need to show is that one party or the other claimed, either expressly or by necessary implication, that the applicable laws of Massachusetts, interpreted as the other party contended they should be, were in conflict with some provision of the Constitution. All that the appellant can fairly argue under this heading is simply this: that the appellee claimed by necessary implication that, if the state statutes meant what the appellant contended they meant, namely, that the appellee could not legally occupy the highways of Massachusetts without first obtaining a written specification of location from the Selectmen, then those statutes were in direct conflict with the Acts of Congress of July 24, 1866, and of March 1, 1884, and were therefore void. In other words, the appellee's claim was that the state laws were directly in contravention of the federal laws, and thus indirectly in contravention of the Constitution of the United States; and that is the claim that Judge Dodge sustained when he said (Rec. p. 22):

> "No state can exclude a telegraph company which has accepted the terms proposed by the national Government for this national privilege from prosecuting its business within the state."

And (p. 23):

> "The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein. A state cannot so exclude or prohibit, either directly or indirectly. . . . And if the state cannot so exclude or prohibit, no town within the state can do so under state authority."

He finds as a fact that the appellee did not obtain before occupying the highways in 1884 "the specification in writing" required by the law of Massachusetts then in force; and concludes that the appellee was nevertheless lawfully

occupying the highways in the town of Essex at the time it made its application of June 1, 1905, for a location or relocation of its lines. We think we have shown conclusively on pages 9–25 of our original brief that the applicable state laws of the year 1884 as construed by the Supreme Court of Massachusetts made the obtaining of the written specification an absolute prerequisite to the appellee's original legal occupation of the highways; and that without that specification the appellee under the laws of Massachusetts was and always thereafter remained a trespasser upon the highways, and in the commission of a continuing criminal nuisance. Those are the laws to which the District Court refused to give effect. Judge Dodge, as shown in our reply brief, does not even find that the appellee before occupying the highways in 1884 even tried to comply with the state laws; but by implication finds the contrary (Reply Brief, pp. 8–9).

As suggested on page 12 of our Reply Brief, the appellee seems to be in the inconsistent position of attacking by necessary implication the validity of the state laws in force in 1884 regulating the original occupation of highways by a telegraph company, and of recognizing, or at least not attacking, the validity of the state laws on the same subject in force at the time of its application of June 1, 1905, although the latter laws were the same in substance as those which were in force in 1884, when the appellee's occupation of the highways began. But it should have been added on page 12 of our Reply Brief that, if this apparent inconsistency is analyzed, it will be found that the final decree in the appellee's favor as clearly involves a setting aside of the state laws in force in 1905 as of the state laws in force in 1884.

CONCLUSION.

We have here a case brought to enforce affirmative rights in the highways of a state alleged to have been conferred upon the plaintiff by two acts of Congress. We find the defendant at the very first opportunity denying in explicit and emphatic terms that Congress had the power under the Constitution of the United States to confer upon the plaintiff the rights claimed by the plaintiff, and by unmistakable reference identifying the particular provisions of the Constitution which forbade the conferring of those rights. There is nothing in the record to show that the defendant did not adhere to this position throughout the trial of the case in the District Court. On the contrary, we find the defendant, when it became an appellant, insisting upon the same position in its assignment of errors. We find the defendant also urging a construction of the two Acts of Congress which would remove at once the constitutional objection to them and the entire basis of the plaintiff's case. We find that construction rejected by the District Court, the plaintiff's construction adopted, and a decree made against the appellant, which necessarily involved a determination against the appellant of the constitutional questions thus presented by it. This the appellant submits is entirely sufficient to make a case for an appeal directly to this Court under Sec. 238 of the Judicial Code.

But if more is required, we find both parties in their pleadings presenting questions involving the construction and application of the Constitution of the United States, and we find those questions discussed by the District Court in its opinion.

And we also find the plaintiff, both in its original bill and in its answer to the town's cross bill, asserting a position with reference to the powers of Congress under the

Constitution of the United States, and with reference to the exercise of those powers by the Acts of July 24, 1866, and March 1, 1884, which if sound renders void certain statutes of the Commonwealth of Massachusetts in force in 1884, when the appellee's occupation of the streets began.

Finally, the constitutional questions thus "involved," "drawn in issue," and "claimed" are not frivolous questions, but, on the contrary, are all substantial and hitherto undecided questions, upon the determination of which the power not merely of the town of Essex, but also of the Commonwealth of Massachusetts itself to regulate the use of the public highways of the Commonwealth, and to be undisturbed in the ownership of the easement of public travel thereon, depend.

If it should be urged in reply to what we have said that the constitutional questions "involved" and "drawn in issue," and the constitutional rights "claimed" in this case, all appertain rather to the Commonwealth of Massachusetts than to the town of Essex, that the Commonwealth is not a party, and that the town cannot avail itself of a violation of the rights of the Commonwealth under the Constitution of the United States, the answer is that, although the property in the easement of public travel in these streets is in the Commonwealth, nevertheless the town is merely a subordinate department of the Commonwealth, and that, as pointed out on pages 60–64 of our original brief, the Commonwealth has delegated to its towns, including the appellant, important police functions, and has imposed upon them onerous liabilities with reference to public highways within their limits, and that this delegation of power and imposition of duties gives the town as a municipal corporation a sufficient interest in the highways to warrant the town in raising the constitutional questions raised in this case. Moreover, the allegation in the third paragraph of the town's cross bill (Rec. pp. 12–13)

that the town originally built and paid for these highways "at its sole expense" is admitted by the appellee in the third paragraph of its answer to the cross bill (Rec. p. 15).

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1915

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

APPELLANT'S REPLY BRIEF.

STATEMENT OF POINTS TO BE DISCUSSED.

By way of reply to the appellee's brief we desire merely (1) to correct certain misstatements of fact and of our position on the law which, undoubtedly through inadvertence, have crept into the appellee's brief; (2) to comment briefly on the discussion therein of the question whether the appellee applied in 1884 for the "location" and "specifications" which Pub. Stats., Chap. 109, Sec. 103, required it to obtain before constructing its line; and (3) to state briefly our objection to the addition suggested on page 99 of the appellee's brief to the change in the final decree proposed by the appellant on page 57 of its brief.

ARGUMENT.

I.

Misstatements of Fact.

(1) On page 15 of the appellee's brief appears the statement, "In neither case was the name of the state of incorporation a part of the corporate name," meaning that the words "of New York" and "of Massachusetts" were not part of the corporate names of the companies that did business in New York and in Massachusetts respectively. And in the paragraph beginning at the bottom of page 81 and ending on page 8[illegible] is statement is repeated in somewhat different words accompanied by certain additional statements concerning the business relations of the New England Telegraph Company of New York and the New England Telegraph Company of Massachusetts.

There is, we think, nothing whatever in the evidence or in the findings of Judge Dodge, or in any part of the record, to warrant these statements. The record appears to show the precise contrary. The name that the appellee chose to litigate under in its bill is the New England Telegraph Company of Massachusetts. In the fifth paragraph of its answer to the cross bill (Rec. p. 15) occurs this language:

> "The defendant admits that the New England Telegraph Company of Massachusetts is a corporation organized for private purposes . . ." etc.

The sixth paragraph of the appellee's answer to the cross bill "admits [Rec. p. 16] the allegations of the sixth paragraph of the cross bill contained." The material allegations of the sixth paragraph of the appellant's cross bill thus admitted are (Rec. p. 13): "that the plaintiff, the New England Telegraph Company of Massachusetts, was organ-

ized under the general laws of Massachusetts " . . . etc.; and that it made a return in 1905 to the commissioner of corporations concerning the ownership of its capital stock.

Charles P. Bruch, the appellee's treasurer (Rec. p. 28), testified "that there was another Telegraph Company *named* the New England Telegraph Company of New York . . ."; that "so far as the public was concerned, the New England Telegraph Company of Massachusetts did its business . . ." etc.; "and so far as the relations of the Company with the towns and state were concerned, it had always used the name of the New England Telegraph Company of Massachusetts in all formal transactions; that its returns to the state were made in that name . . ." etc. (Rec. p. 29).

Edward B. Pillsbury, the appellee's superintendent, wherever he refers in his testimony (pp. 30–36) to the two companies gives in each case the name of the state as a part of the corporate name, and states (p. 31) "that what he really meant to sign was 'The New England Telegraph Company of Massachusetts,' " which is placed in quotation marks in the record. It is stated as an agreed fact (Rec. p. 39) that the appellee "and the New England Telegraph Company of New York have duly accepted the provisions of the Telegraph Act of Congress." It is also stated (Rec. p. 45) as an agreed fact "that the New England Telegraph Company of Massachusetts was duly incorporated under the laws of Massachusetts on April 7, 1884."

These references are sufficient to show that in its articles of incorporation, its returns to the Massachusetts commissioner of corporations, and its other dealings with the Massachusetts authorities, one of these companies uses the words "of Massachusetts" as part of its corporate name; that both companies use the names of the respective states as part of their corporate names in their dealings with the United States Government; and that the Treasurer and Superintendent of the appellee use the names of the respec-

tive states as part of the corporate names of the respective companies whenever they have occasion either to refer to the companies or to do business in the name of the appellee. There is nothing whatever in the record tending in any degree to offset the effect of this evidence and of these agreed facts. And Judge Dodge says nothing in his opinion giving the least support to the appellee's statement that the words "of Massachusetts" and "of New York" are not parts of the corporate names of the respective companies. We therefore submit that the appellee ought not to say in its brief that "in neither case was the name of the state of incorporation a part of the corporate name." The elaboration of this statement on page 82 of the appellee's brief is equally unwarranted. It is there said:

> "While in its relation with the public the Massachusetts company uses the name Postal Telegraph Cable Company in all formal transactions, and in relation to the construction, operation, and maintenance of its line, and in its relations to the state, the Massachusetts company uses its charter name the New England Telegraph Company, and describes itself as of Massachusetts."

For this the appellee cites the testimony of Bruch (p. 29). A reference to his testimony above set forth shows that he did not make the discrimination attributed to him by the appellee. We have discussed this matter fully, not because it is vital or even especially important to our case, for it is not; but because we desire not to run the least risk of an adverse decision based on a mistake of fact.

(2) On page 38 of the appellee's brief occurs the statement:

> "On the other hand if the post roads occupied by the telegraph company were public highways, then if the right to occupy such post roads was not given by the Act of Congress of 1866, the state would have the right to exclude the telegraph company from such

> post roads, *because, as pointed out by the appellant here on pp. 40–44 inclusive of his brief*, any permission given to the telegraph company by the state to occupy such post roads could have been no more than a license and revocable at the pleasure of the state, so that the state would not only have the right of excluding the company from such streets for the purpose of collecting a state tax, but would have the right so to exclude it even arbitrarily." (Italics ours.)

We decidedly object to the words "as pointed out by the appellant here on pp. 40–44 inclusive of his brief," and to the proposition of law thus attributed to the appellant. That proposition of law is not "pointed out" on pages 40–44 of our brief, or elsewhere in our brief, and we decline to be responsible for it. Our position is *not* that the state of Massachusetts, having once as a property owner (the owner of the public easement of travel in said streets) permitted the appellee to occupy said streets, could afterwards, either in its proprietary or in its sovereign or political capacity either arbitrarily or as a penalty for non-payment of taxes, have excluded it from such streets. On pages 40–44 of our original brief referred to by the appellee we were simply endeavoring to establish the proposition that on the undisputed facts in the case, the Commonwealth of Massachusetts had in 1884, under the decisions of this Court, and of the Supreme Court of Massachusetts, a sufficient proprietary interest in these streets to entitle it to prescribe the terms and conditions upon which the *original* occupancy of the streets by the appellee could be made; and that the Act of Congress of July 1, 1866, did not confer a right upon the appellee to occupy the streets in the first instance without complying with the Commonwealth's terms, any more than it conferred upon the appellee a right to run its lines through the front yard of a citizen of Massachusetts without first coming to terms with him.

The point urged in our brief is that in respect of its ownership of the public easement of travel in its highways the Commonwealth of Massachusetts stands toward the appellee, and companies like the appellee, precisely as a private landowner stands toward them; and that as against the national government the state is in as true a sense the owner of the public easement of travel in its highways as it is in respect of the ownership of its state house grounds, or of the highways constructed by it directly, to the soil of which it has title in fee simple. We do not contend that having once permitted the appellee to make a first and original occupancy of its highways, the Commonwealth could afterwards exclude it therefrom either arbitrarily or as a penalty for non-payment of taxes. The distinction is a clear one, and is, we believe, the one intended by this Court in the opinions in

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160;

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92;

Western Union Tel. Co. v. *Mass.*, 125 U. S. 530;

and in several other decisions referred to and discussed in our brief.

We add that the appellee appears singularly oblivious to this distinction, not only in the part of his brief here under discussion, but also in its references to the language of the Court in *Western Union Telegraph Co.* v. *Richmond*, supra, in which not only was there nothing to show that the interest of the city of Richmond in its streets was other than that of the Commonwealth of Massachusetts in these streets, namely, the holder as trustee of the easement of public travel; but the contrary is implied in the language of Mr. Justice Holmes, where he says, pages 169–170:

> "The rights of the city to the streets are left a little vague, but the bill assumes that they are such

> as to authorize the charge of a reasonable rental on the principle of *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92. Any license that the city may have granted as owner or representative of the owner of the public easement, or otherwise, may be assumed to have been revoked, and so far as the city's title is infringed by the appellant, nothing appears to limit the city's right to insist upon it as fully as a private owner might. Leaving the question of title on one side, except so far as to note that the appellant does not show one, and that the city has power to admit it to the highways, the other regulations complained of do not violate the appellant's constitutional rights."

Our position is that the most important, if not the only, rights conferred by the Act of Congress of July 1, 1866, upon telegraph companies are, first, the right to be treated alike and without discrimination by the state in respect of the terms of original occupancy of the state's highways; second, the right to be treated without arbitrary discrimination in respect of subsequent police regulation; and, third, the right not to be excluded by the state from its highways after an original legal occupancy. But it does not confer the right upon any telegraph company to occupy the highways of a state in the first instance without complying with the terms imposed by the state upon all telegraph companies which have complied with the Act of Congress. These discriminations seem to have been misunderstood by the appellee in every part of its brief devoted either to the statement and discussion of our position, or to the discussion and analysis of the decisions of this Court. It is unnecessary to take up and refute in detail all the statements in the appellee's long brief on this subject. We rely upon the analysis of the decisions contained in our original brief.

II.

Comments on the appellee's discussion of the question whether before occupying the streets in 1884 it applied for the "location" and "specifications" which Pub. Stats., Chap. 109, Sec. 103, required it to obtain before constructing its line.

The appellee characterizes as "amazing" the assertion on page 11 of the appellant's brief that

> "the evidence, though somewhat conflicting, clearly warrants the conclusion that the reason why no 'location' and 'specifications' were ever granted to this plaintiff was that it never applied for any."

This means, of course, that the appellee did not apply for any before the original occupation of the streets in 1884. On the main point, which is whether the appellee did or did not in 1884, or at any time thereafter, *obtain* any "location" or "specifications," it is said in the appellee's brief (p. 73):

> "The appellee does not dispute this, but although it contended at the hearing that on the evidence such a writing or permit had been given it, it accepts the finding of the District Court to the contrary."

The appellee, however, devotes five pages of its brief to an attempt to prove that in 1884 it made a written application for the "location" and "specifications," which were then refused. The appellant's statement that the appellee did not make an application in 1884 may be amazing; but it is evidently the view entertained by Judge Dodge. He says (Rec. p. 23):

> "As has been stated, the specification in writing provided for by Chap. 122, Sec. 2, Rev. Laws, has been, though applied for, expressly withheld and refused

since 1905"; and "The plaintiff has been *at least since 1905* constantly in the attitude of requesting the town to give the specification." (Italics ours.)

If the appellee believed that it was essential to its case to show that before occupying the streets in 1884 it did everything in its power to comply with the laws of Massachusetts then in force, it was certainly incumbent upon the appellee to prove that fact. It tried to show that it in fact obtained the "location" and "specifications" in 1884; but Judge Dodge found otherwise, and the appellee now accepts the finding and abandons its suggestion of a mutilation of the town records. But although the appellee no longer contends that it obtained any location in 1884, it still adheres to its claim that it applied for one then. Judge Dodge, however, who saw and heard the only two witnesses upon whose testimony the appellee relies, was as incredulous about the existence of an application as about the granting of one. He evidently did not believe the appellee's witness George F. Bartlett (pp. 32–33), and he attached no importance to the interpretation (p. 45) placed by the selectman Aaron Cogswell on cross-examination on the remark made to him long since by Daniel F. Bartlett, the deceased selectman, that "the New England Telegraph Company of New York never had a location in the town"; that the witness asked him if he understood what company he meant, namely, the company then in the town, and Bartlett replied "Yes, he knew what was meant." Cogswell's interpretation of this remark as meaning that the selectmen "had definitely acted on a request and had refused it," appears strained on the face of it, and certainly falls far short of being convincing evidence of the fact that any such request had been made. It is as consistent with the view that the company never applied for a "location" as it is with the view that it applied for one and was refused. And now that the appellee withdraws its claim that the town records have been mutilated, and makes no suggestion

that the records were not properly kept, it would seem that the fact that there is no record of any such application is well-nigh conclusive against the claim that any such application was ever made, either in writing or orally. Certainly the appellee has not sustained the burden of proof on this point.

We continue to rely, therefore, upon the analysis of the testimony contained on pages 11–14 of our original brief, now supplemented by the appellee's concession that the town's records have not been mutilated. Perhaps it would have been more accurate for us to aver that "*One* reason why no 'location' or 'specifications' were ever granted to this plaintiff was that it never applied for any," instead of saying that "*The* reason why no 'location' or 'specifications' were ever granted to this plaintiff was that it never applied for any." In our view, however, the question why the appellee did not obtain any location before constructing its lines in 1884 is of far less consequence than the question whether it did in fact obtain one, *i.e.*, whether it in fact came to terms with the Commonwealth of Massachusetts represented by the selectmen of Essex before it made its original occupation of these streets. If the appellee deems it important to show that the appellee at that time tried to come to terms with the Commonwealth, and failed to do so, then we aver that it has entirely failed to prove that such was the case. But in our view the question is merely collateral, and not essential to the determination of the case. For whether the appellee tried to get a location in 1884 or not, it admittedly did not get one.

III.

Appellant's objections to the addition suggested on page 99 of the appellee's brief to the change in the final decree proposed by the appellant on page 57 of its brief.

We ask no space to reply to the contention that our request for an alteration in the final decree comes too late. It may be frankly conceded that this litigation has been long drawn out. Since the litigation was begun many boards of selectmen have come and gone, the town's original counsel has died, and none of the counsel now representing the town represented it in any of the proceedings in the District Court. But all that can hardly be urged as a reason for perpetuating a final decree which seriously impairs the rights reserved to the Commonwealth of Massachusetts by the Constitution of the United States, if such is the effect of this decree. That such is its effect, even if the appellee's general position in reference to the scope of the Act of Congress of July 1, 1866, is sound, and our position is unsound, we have endeavored to show on pages 57–65 of our original brief, and we find nothing to meet our arguments in the portion of the appellee's brief devoted to this particular matter (pp. 97–99). On the contrary, the appellee's failure to meet some of our arguments at all, and to deal with others in any way except by mere assertion, is so apparent as to suggest that the appellee itself has serious doubts as to the propriety of the final decree. There is nothing to show an *assent* by the Town either to the form or the substance of the final decree. The amendment to the final decree suggested on page 57 of our original brief is:—

> "Provided that nothing herein contained shall be construed to prohibit a reasonable exercise by the board of selectmen of the town of Essex of the regulative powers concerning telegraph lines conferred upon said selectmen as a public board by the laws of the Commonwealth of Massachusetts now or hereafter in force, or any action by the defendant, its officers, agents, and employees, authorized or required by said laws."

The appellee makes no serious objection to this amendment, but suggests that if it should be adopted, the words

"reasonable and valid" should be inserted before the phrase "laws of the Commonwealth of Massachusetts now or hereafter in force." There is no necessity for this amendment. There is no suggestion in the appellee's brief that the present laws of the Commonwealth of Massachusetts are either unreasonable or invalid. What the appellee objects to is the alleged unreasonable action of the board of selectmen under those laws—not the unreasonableness of the laws themselves. It is to be assumed that the laws of Massachusetts will continue to be reasonable and valid, and not in violation of the Constitution of the United States. If laws should be enacted in the future which seem to violate the Constitution of the United States, it will be time enough to test their validity when they are enacted. It certainly is inappropriate to suggest in a decree of a federal court that existing laws not declared to be invalid in the particular decision may nevertheless turn out to be so, and that future laws may be open to the same objection.

We continue to contend on the grounds stated in our original brief that the decree of the District Court should be reversed and a new decree entered dismissing the appellee's bill with costs to the appellant; and that if the bill is not dismissed, the costs of this appeal should be allowed to the appellant by reason of the extreme and unwarranted scope of the final decree.

Respectfully submitted,

WM. G. THOMPSON,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX,
Appellant,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS,
Appellee.

APPELLEE'S REPLY BRIEF.

G. PHILIP WARDNER,
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SUPREME COURT OF THE UNITED STATES.

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No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

APPELLEE'S REPLY BRIEF.

CORRECTION.

The figures 1886 in the ninth line of the heading on page 31 of the appellee's original brief are a misprint and should of course be 1866.

1.

On page 2 of the appellant's reply brief it is stated that the record does not warrant the statements, made by the appellee on pages 15, 81 and 82 of its original brief, that neither in the case of the New England Telegraph Company, a New York corporation, or in the case of the New England Telegraph Company, a Massachusetts corporation, was the name of the State of the incorporation a part of the corporate name.

The appellee does not think that the point is of any materiality, but, whether it is or not, it is true that the

above statements do not appear to be warranted by the record. They crept into the appellee's brief not by intention but by inadvertence, and the appellee regrets that such a mistake should have been made.

2.

a. In

New England Telephone, etc. Co. v. *Boston Terminal Co.*, 182 Mass. 397, and in

Boston Electric Light Co. v. *Boston Terminal Co.*, 184 Mass. 556,

cited on pages 41 and 42 of the appellant's original brief, it was expressly decided that any permission given to a telegraph company by the State of Massachusetts under the statutes involved in the case at bar was nothing more than a license revocable at the pleasure of the State.

The appellant after stating and quoting from *Boston Electric Light Co.* v. *Boston Terminal Company,* 185 Mass. 556, said on page 43 of the appellant's original brief: "Having stated that companies placing wires, conduits, or similar things in public streets do so under a revocable license, he (Chief Justice Knowlton) added, page 570:"

It is submitted therefore that the passage from the appellee's original brief quoted on pages 4 and 5 of the appellant's reply brief is entirely correct.

b. The appellee is entirely willing that the words printed in italics in the quotation on page 5 of the appellant's reply brief should be eliminated from the appellee's original brief, as they are not in any way material to the appellee's argument.

c. The appellant, on pages 5 to 7 of its reply brief, apparently admits that the State of Massachusetts having once, as a property owner, the owner of the public easement of travel in its streets, permitted the appellee to

occupy said streets could not afterward either in its proprietary or in its sovereign or political capacity arbitrarily or as a penalty for non-payment of taxes exclude the appellee from the streets, but the appellant says the State of Massachusetts is entitled to prescribe the terms and conditions upon which the original occupancy of the streets by the appellee could be made. In its original brief the appellant had (on p. 38) said:—

> "The time we submit has come to decide squarely that so far as the original right to occupy the highways of the State is concerned the Act of 1866 has no application and leaves the company no better off than it would be without the statute."

Clearly there is no basis for any such distinction in the Act of Congress, as the same rights are thereby given to telegraph companies to construct as to maintain and operate. Nor do the cases relied upon by the appellant and cited on page 6 of its reply brief warrant any such distinction. In fact, in *Western Union Tel. Co.* v. *Massachusetts* quite the contrary was stated. The court there said:

> "While the State could not interfere by any specific statute to prevent a corporation from placing its line along these postroads, or stop the use of them after they were placed there", etc.

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92,

the court said that the occupation by this Interstate Commerce company of the streets cannot be denied by the city. The passage from *Western Union Tel. Co.* v. *Richmond,* cited on pages 6 and 7 of the appellant's reply brief, is not to be interpreted as meaning that the city whatever the nature of its rights in its streets had not-

withstanding the Act of Congress of 1866 exactly the same rights in relation to the occupation of its streets by telegraph companies as the owner of private property has in relation to the occupation by telegraph companies of private property. In fact, if such were its meaning it would prove too much for the appellant's present purpose for in such case not only would the city have had the right to prevent an original occupation of its streets, but could also have excluded the telegraph company even after it had erected its lines in pursuance of a lawful permit, which the appellant admits the city could not do.

d. The appellant states on page 6 of its reply brief that as against the National Government the State is in as true a sense the owner of the public easement of travel in its highways as it is in respect of the ownership of its State House grounds, or of the highways constructed by it directly, to the soil of which it has title in fee simple.

It is not necessary to determine whether the State can in any proper sense be said to be the owner of the public easement, because, so far as the public highways of Massachusetts are concerned, the easement includes not only the right of travel, but the right to use the highways for the construction and operation of telegraph lines. It will at least be conceded that the State is the guardian of the public easement, and therefore it is its duty not only to protect the easement of travel, but the easement of using the highways for telegraph purposes. All that is left for the State so far as either is concerned is the proper regulation of the use of the highways by the parties entitled to use them, and of course this right of regulation must yield to a paramount right of Congress to regulate the same thing where it becomes necessary or proper in the field of Interstate Commerce and in the administration of the postal system.

e. The appellant states on page 7 of its reply brief that the discrimination made by it between the right of the State to prevent an original entry and the right of the State to exclude after a lawful occupation has been effected was misunderstood by the appellee. The appellee quite understood the discrimination and submits that it has been met by the proposition stated on page 31 of its original brief. If that proposition is sound, then the position of the appellant is not sound.

3.

Pages 8 to 10 of the appellant's reply brief are devoted to an attempt to show that no application was made by the appellee for specifications in 1884.

a. The appellant says that such is evidently the view entertained by Judge Dodge. What Judge Dodge said on the point appears on page 23 of the record and is quoted on pages 8 and 9 of the appellant's reply brief. Judge Dodge says that there was an express refusal since 1905. He could not say that there was an express refusal of the petition of 1902 as that petition was never acted on. (See appellant's original brief, p. 13.) He might well have hesitated about saying that there had been an express refusal of the petition of 1884 because the only evidence of an express refusal came from the appellant's witness Cogswell, who said (Rec. p. 45) that he inferred from what Mr. Bartlett, the former selectman, said that what he meant to say was that they had definitely acted upon a request and had refused it. The words "since 1905" where they first appear do not limit the words "though applied for", but only limit the words "expressly withheld and refused", but even if it were otherwise, it would not follow, because the court found that the specification had been applied for since 1905, and because the court found further on that the plaintiff had been at least since 1905 constantly in the attitude of requesting the town to

give the specifications, that the court is to be taken as having found that there was no application for specifications prior to 1905. Such a construction of the court's decision would be entirely inconsistent with the admitted fact that there was a written application in 1902. (See appellant's original brief, p. 13.)

b. The appellant says on page 9 of his reply brief that the court evidently did not believe the appellee's witness, George F. Bartlett. The appellant apparently bases this idea to some extent on the fact that in the District Court the appellee contended that the selectmen of the Town of Essex did in fact grant a specification in writing and that the appellee suggested a mutilation of the records as a reason why such specification did not appear on record, and that the District Court found against these contentions.

These contentions were based solely on the evidence of Joseph Atchison. (Rec. p. 33.)

The finding of the District Court does not mean necessarily that it disbelieved the evidence of Atchison. It more probably means that the court felt that assuming Atchison's evidence to be true it would not warrant the finding that there had been a mutilation of the records, or that there had been a specification granted. But, however that may be, Atchison gave no evidence whatever on the question as to whether there had been an application for a permit; that evidence came solely from the appellee's witness, Bartlett. (Rec. pp. 32, 33.) And Bartlett gave no evidence whatsoever on the matter of the mutilation of the records. It is absurd to contend that because the court found against the appellee's contention that there had been a mutilation of the records and that specifications had been granted, which contention was based on the evidence of Atchison, that therefore the court must be taken to have found against the appellee's contention

that specifications had been applied for, which contention was based on the evidence of an entirely different witness, Bartlett.

c. The appellant's own witness Cogswell, the chairman of the board of selectmen, stated (Rec. p. 45):

> "That he inferred from what Mr. Bartlett, former selectmen, said that what he meant to say was that they had definitely acted on a request and had refused it."

The appellant finds it necessary to criticize the evidence of its own witness on this point, characterizing the above statement as "strained on the face of it" and as falling "far short of being convincing evidence of the fact that any such request had been made". (See Appellant's reply brief, p. 9.)

The appellee is absolutely unable to understand how it can be said of Cogswell's statement, that "It is as consistent with the view that the company never applied for a location as it is with the view that it applied for one and was refused". Much or little weight may be attached to Cogswell's statement, but surely for what it is worth it does tend to show that an application had been made and had been refused.

d. The appellant says on page 10 of its reply brief that

> "the fact that there is no record of any such application is well nigh conclusive against the claim that any such application was ever made, either in writing or orally".

The trouble with this argument is that it assumes that applications for specifications where they are not acted on are recorded. This does not appear to be the case. The town clerk made an affidavit that the records of the Town

of Essex showed no transactions with the New England Telegraph Company of Massachusetts. (Rec. pp. 50, 51.) The selectmen made an affidavit that there were no records in the year 1884 or in the year 1902 relating to any petition of the New England Telegraph Company. (Rec. p. 52.) There is absolutely no question that an application for specifications was made by the appellee in 1902, which application was never acted on. (Rec. p. 46; Appellant's original brief, p. 13.) It appears, therefore, that no applications for specifications are recorded in the town's books and that at least not all applications for specifications are recorded in the selectmen's books. No inference therefore unfavorable to the appellee can be drawn from the fact that neither in the town's records nor in the selectmen's records is there any record of an application by the appellee in 1884.

It is stated on page 11 of the appellee's reply brief that "The appellee itself has serious doubts as to the propriety of the final decree". The appellee submits that the final decree is proper, but it has nothing to add to what it has said on this point in its original brief.

G. PHILIP WARDNER,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 55.

TOWN OF ESSEX,
APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS,
APPELLEE.

BRIEF FOR THE APPELLEE,
NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

G. PHILIP WARDNER,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

BRIEF FOR THE APPELLEE,

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court for the District of Massachusetts, sitting in equity, granting an injunction as prayed for in the amended bill of complaint and dismissing a cross-bill. The bill was filed on July 31, 1905, in the Circuit Court of the United States for the District of Massachusetts to enjoin and restrain the Town of Essex in the State of Massachusetts from interfering in any manner whatsoever with the appellee's line of telegraph in said town, or with the location or relocation by the appellee on the roads and highways then occupied by its said line of telegraph in said town, or with the resetting of the poles of said line in said town by the appellee, or with the appellee's making such repairs and changes as were necessary to put said line in a condition of safety and efficiency, or from

in any manner causing or allowing any other person or corporation to interfere with or stop such relocation, resetting, repairs or changes by the appellee.

On July 31, 1905, upon appellee's motion, supported by affidavits, a restraining order was issued, and on September 5, 1905 (Record, p. 7), upon appellee's motion, supported by affidavits, a temporary injunction was issued as prayed for. No motion to dissolve this injunction has been made by the town.

On September 26, 1905, the town filed its answer and a cross-bill praying that the appellee be ordered to take up its poles from the streets of the town and that the company be enjoined from using its poles or wires until it should have obtained a franchise from the selectmen of the town as provided by the laws of the Commonwealth of Massachusetts. On March 28, 1906, a replication was filed by the Town of Essex, and on March 30, 1906, a replication was filed by the New England Telegraph Company.

The cause came on for a hearing on June 23, 1913, and on October 27, 1913, a decree was entered granting a perpetual injunction as prayed for and dismissing the cross-bill. (Record, p. 18.) From this decree the Town of Essex has appealed to this Court.

PLEADINGS.

The bill alleges in substance that the New England Telegraph Company is a Massachusetts corporation authorized by its charter to maintain and operate lines of telegraph in and between various States of the United States, including the State of Massachusetts, and is actually engaged in an interstate and foreign telegraph business; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000 and arises under the constitution and laws of the United States; that

the company duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of the United States entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes", approved July 24, 1866, and amendments thereto; that the company has fully complied with the provisions of said Act of Congress in that it has transmitted to and from the Government of the United States telegraph messages at rates fixed by the Postmaster General of the Government of the United States, and has fully complied in all other respects with said Act of Congress and the obligations thereof; that said Act of Congress of 1866 authorizes the company by reason of said acceptance to construct, maintain and operate its lines of telegraph over and along any of the post roads of the United States, and that by the Act of Congress of March 1, 1884, all public roads and highways kept up and maintained as such are declared to be post roads; that the highways in said Town of Essex upon which the company desires to construct its line of telegraph have been and now are public highways kept up and maintained as such, and are post roads within the meaning of the Acts of Congress as aforesaid; that in 1884 the company constructed a line of telegraph from the City of New York in the State of New York to the Translantic cable station in the Town of Rockport in the Commonwealth of Massachusetts, through the Town of Hamilton, which borders Essex on the west, to a point on the easterly boundary of said Hamilton which was fixed by the action of said town; that the point in the westerly boundary of the City of Gloucester which borders Essex on the east, where the company's line touches said boundary, was fixed by the action of said city; that between the points so as aforesaid fixed by the Town of Hamilton and

the City of Gloucester there are absolutely no other roads or highways whatsoever that can be used as a route for the company's line than those now occupied by it, to wit: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line; that the company constructed its line as aforesaid through the Town of Essex with the consent and permission of its selectmen and it has remained substantially as so constructed down to the time of the filing of the bill; that said highways are of sufficient width to allow of the construction and operation of the line without inconvenience to the public; that at the present time and for a considerable period prior thereto the company's line in the Town of Essex is and has been in an unsafe condition and dangerous to the public, and liable at any time to become wholly inefficient for the purposes of the company's business, and for these and other like reasons the company's line in said Town of Essex needs relocating on said highways on which it now exists, for the benefit of the abutters and the town, and to meet the present conditions of the company's business; that, therefore, on June 1, 1905, the company for the purpose of relocating its line of telegraph in the Town of Essex on the highways aforesaid filed a petition in writing with the Board of Selectmen of the Town of Essex, praying for a location for its poles and wires, and license to maintain the same in the following named streets and highways of said town, viz., from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions now occupied by the old poles and any changes in the present location to be made under the direction of the Board of Selectmen; that the Board of Selectmen refused this petition and orally declared to the representatives of the company that it was the intention of the town to prevent the

company from maintaining or operating any line of telegraph whatsoever within the limits of said town, and threatened if the company attempted to relocate any of its poles in said highways to prevent the company from so doing; that thereupon the company was obliged by reason thereof and by force to stop said relocation, and did stop such relocation, and by reason thereof has been and still is unable to relocate its said line of telegraph or any portion thereof on the said highways in and through said town; that thereupon the company attempted, without any relocation, in order to put its said line in said town into a safe and efficient condition, to reset certain of its poles, substituting sound poles for rotten poles, in the same places occupied by the old poles, and to restring its wires on said line, and to do other repairs necessary to put the said line into a safe and efficient condition, but, nevertheless, the selectmen of the Town of Essex peremptorily forbade the company from resetting its poles, from substituting sound for rotten poles, or from restringing its wires, or making any repairs whatsoever of any name, nature or description, and threatened to take steps to prevent the company from so doing if it continued in said attempt; that thereupon the company was obliged by reason thereof and by force to stop all repairs, and resetting and restringing, and by reason thereof the company has been and still is unable to repair its line or reset its poles or restring its wires in said town; that the line in said town is in a precarious condition, that there is extreme peril to life and limb and imminent danger of there being a break and interruption in its line of telegraph running so as aforesaid from the City of New York to said cable station in the Town of Rockport; that the company's line within the limits of the Town of Essex forms an important link in the interstate and international telegraph system maintained and operated by the com-

pany; that an interruption and break in said system in the Town of Essex would cause great damage to the company, and might be attended with serious results to many people in the United States, and embarrass the Government of the United States.

The answer (Record, p. 7) denied in substance all of the allegations of the bill except that it averred that a certain line of telegraph was constructed in its streets without authority or permission of the town or any of its duly authorized officers; and except that it admitted that the town through its selectmen notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatever within the limits of said town, and that the selectmen forbade the plaintiff from resetting its poles, from changing the locations of its poles, from restringing its wires or from doing business of any sort in said town on the highways of said town until first a franchise was obtained therefor in accordance with the laws of Massachusetts.

The answer specifically denied that the telegraph company had any rights whatsoever in the streets of the town under the Act of July 24, 1866, and the Act of March 1, 1884, without having first obtained a franchise from the Board of Selectmen in accordance with the Statutes of the Commonwealth of Massachusetts; that Congress had any authority under the Constitution of the United States to grant the plaintiff any rights in the public highways of the town, or that the company had any rights whatsoever on the highways of the Town of Essex, either by grant from Congress, from the General Court of Massachusetts, or from the selectmen of the Town of Essex, or any other legally constituted authority, and asserted that if the appellee had any poles or wires in the streets of the town they were there without right. (Record, pp. 8 to 11.)

By its cross-bill (Record, p. 12) the town alleged that

the Government of the United States, or any body corporate or any person whatsoever, had no interest in the highways in question except the abutters, who owned the fee subject to the right of the public to pass and repass thereon; that before a telegraph company obtains any rights in the streets of any of the municipalities of Massachusetts it must obtain the consent of the selectmen of the town in accordance with the Statutes of Massachusetts; that in 1884 the plaintiff, without obtaining the consent of the selectmen of the Town of Essex, and without obtaining any right whatsoever in the defendant's streets, erected wires and poles in streets specified in the bill and thereafter maintained the same against the objection of the defendant and its selectmen; that since the bringing of the bill the defendant requested the plaintiff to forthwith remove its poles and wires from said streets, but that defendant refused to do so; that defendant through its selectmen did everything in their power to induce the plaintiff to remove its poles and wires from defendant's streets, but plaintiff refused and still refuses and continued to trespass on defendant's highways without right and without authority and continued so to do.

The prayer of the cross-bill was that the plaintiff be ordered to forthwith take up its poles from said streets, and that it be enjoined from using said poles and wires for its business purposes until it had first obtained a franchise from the Board of Selectmen of the defendant as provided by the laws of Massachusetts.

The plaintiff's answer to the cross-bill denied all of these allegations except the allegation that the town had tried to get the plaintiff to take its poles and wires from the defendant's streets.

STATEMENT OF FACTS.

The appellee is a Massachusetts corporation incorporated April 7, 1884, "for the purpose of constructing lines of aerial or underground wires of telegraph both within and without the limits of said Commonwealth and the owning, constructing, maintaining and operating lines of aerial or underground electric telegraph, both within and without the limits of said Commonwealth and the owning of interests in such lines". Its capital stock is $30,000. (Record, p. 19.)

The Town of Essex is a municipal corporation of the Commonwealth of Massachusetts. (Record, p. 8, paragraph 2.)

The appellee's line in the Town of Essex forms part of a line constructed by the company through Massachusetts from the Rhode Island line to Rockport, crossing on its way through various Massachusetts towns and cities. At Rockport it connects with a line of telegraph cable to Europe. At the Rhode Island line it connects directly or intermediately with telegraph lines constructed by telegraph companies in alliance with the appellee, affording telegraphic communication to points through the United States. It was constructed to be and it has been since used as part of a system of lines in connection, affording telegraphic communication between these United States points and Europe, as well as between points on the connected lines within the United States. The business done over this line is the handling of telegrams for the public, the handling of cablegrams to and from the cable terminus at Rockport, and the handling of Government telegrams, the transmission of news matter, market quotations, and such business as is usually offered to a public telegraph company. About 600,000 cable messages pass over this line a year, and a break in the line of the com-

pany would deprive the cable system of a very important part of its facilities. (Record, pp. 20, 29.) A considerable amount of Government business passes over this line. (Record, pp. 19, 29.) The appellee prior to the construction of this line in the Town of Essex filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of July 24, 1866. (Record, pp. 19, 29, 39.) The roads and highways within the Town of Essex upon which the appellee's line is maintained are Western Avenue, Main Street and Eastern Avenue, as appears from the fourth paragraph of the bill of complaint and the third and eighth paragraphs of the cross-bill. (Record, pp. 3, 12, 13.) These roads and highways are public roads and highways kept up and maintained as such within the meaning of the Act of Congress of March 1, 1884, as appears from paragraph 3 of the cross-bill (Record, p. 12), which alleges: "That from time to time the defendant has established public highways within its borders and at its sole expense has built and maintained the same from time immemorial. That among those public highways so constructed and maintained are the following named streets: Western Avenue, Main Street and Eastern Avenue."

George F. Bartlett, constructor, assistant superintendent and right-of-way man for the appellee in 1884, testified that he prepared a petition in writing for a right of way in the Town of Essex for the appellee's telegraph line, and presented it to Mr. Bartlett, the chairman of the Board of Selectmen of the town; that the petition contained the location of streets through which the line was to pass, and was presented to the chairman in June or July, 1884, before any line was constructed; that he had a conference with Mr. Bartlett and the other two selectmen, at Mr. Bartlett's house, and Mr. Bartlett told the witness that the petition would be granted. On cross-examina-

tion the witness testified that he did not see the permit signed by the selectmen, and had no personal knowledge that it ever was signed. (George F. Bartlett, Record, pp. 32, 33.)

The only evidence offered by the town in contradiction of the foregoing testimony of George F. Bartlett was the testimony of Sargent (Record p. 40), who said that he had heard Mr. Bartlett, the chairman of the Board of Selectmen of the town in 1884 (who was dead at the time of the hearing), say that the company had no rights to go through the town; the testimony of James (Record, p. 41) that he heard said Bartlett say that the Cable Company had no permit whatever to locate their poles in the town; the testimony of John B. Bartlett (Record, p. 41), the son of the former chairman, who said that he had heard his father say that the appellee had no location; and the testimony of Cogswell (Record, p. 45) that he inferred from what Mr. Bartlett, the former selectman, said, that they had definitely acted on the request and had refused it.

After the appellee's incorporation in April, 1884, and after the application for a location made by its agent, George F. Bartlett, as aforesaid, the appellee constructed a telegraph line about four miles in length, consisting of 186 poles and wires thereon, carried through Essex from the line between it and the adjoining town of Hamilton, through highways or roads within Essex, known as Western Avenue, Main Street and Eastern Avenue, to the line between Essex and the adjoining town of Gloucester. (Record, p. 13, par. 8; pp. 19, 20; Atchison, Record, p. 33; Hazelton, Record, p. 39.)

During the construction of the line, and for seven or eight years afterwards, no objection appears to have been made by the town to the construction of the line or the presence of the poles and wires in the streets. (George F. Bartlett, Record, p. 33; Atchison, Record, p. 33; Hazelton,

Record, p. 39.) At the time of the construction of the electric railway through the town, which was about 1895, the selectmen asked the appellee to move a number of its poles out of the way of the electric railway. The appellee's employee, McCaffrey, went over the route with Selectman Kimball, and Kimball pointed out to him where the poles might be set after they had been moved out of the way of the electric railway. About half the poles in the town were so moved at the request of the selectmen, into locations designated by Selectman Kimball. (McCaffrey, Record, p. 34.)

During the twenty-one years from 1884 to 1905, the appellee maintained and operated the line constructed through Essex, as above, without interference on the part of the town. (Record, p. 20.) While the town denied in its answer (Record, p. 9) the allegation in the bill of complaint that the highways were of sufficient width to allow the construction and operation of the line without inconvenience (Record, p. 3), the cross-bill contains no allegation that the line would involve any inconvenience or interference with travel on the streets, and the District Court found that "the evidence does not show any interference by this line with the ordinary travel on the roads mentioned". (Record, p. 20.)

In 1902 the appellee's line in Essex was in a very bad condition and very seriously in need of reconstruction, relocation, resetting and repairs, as appears from the testimony of Hebb. (Record, pp. 35, 36.) Accordingly on February 3, 1902, Hebb, in behalf of the appellee, presented a petition in writing for a location for appellee's poles and wires and license to maintain the same on the following named streets and highways of the town, namely: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions then

occupied by the old poles, and any changes in the locations to be made under the direction of the Board. (Record, pp. 45, 46.) No definite action appears to have been taken on this petition (Hebb, Record, p. 36; Cogswell, Record, p. 44), but Cogswell testified that he considered the Board's failure to act on the petition as equivalent to a refusal. (Cogswell, Record, p. 45.) By the time the appellee's bill of complaint was brought its line in the Town of Essex was in an exceedingly unsafe and dangerous condition and in extreme need of repair, relocation and resetting. It appeared that the poles were badly decayed both at the tops and in the ground (Pillsbury, Record, p. 30; Hebb, Record, p. 35); that the poles were too high for safety, in some instances as high as 75 feet (Pillsbury, Record, p. 30; McCaffrey, Record, p. 34; Hebb, Record, p. 35); that in many instances they leaned over at angles, the tops being two or three feet out of line from the bottoms (Bartlett, Record, p. 41); that the line was so weak that a violent windstorm was liable to blow it over, or the giving way of a guy on a corner pole would allow the line to fall into the street, and this did actually happen just prior to the application to rebuild, resulting in the blocking of the street and stopping the trolley cars after dark (Pillsbury, Record, p. 31); that the line was in such a condition that it was likely to fall down and cross the trolley, which would mean great danger to life and property all along the route, besides interrupting the telegraph company's traffic and the street car service; that the effects of crossing wires may be felt for hundreds of miles; that fires may be, and have been, set from this cause (Pillsbury, Record, p. 31; Hebb, Record, p. 36); that for most of its length the line was too near the trolley wire (Hebb, Record, p. 36); that this fact made necessary the use of brackets and side arm construction, which is weak and inferior construction and generally considered unsafe

(Pillsbury, Record, p. 30; Ryan, p. 36); that in many places the wires were badly mixed in with the trees (Ryan, Record, p. 38); that in others the construction of driveways, lawns, etc., made the location of the poles a nuisance to abutters and very undesirable on all grounds (Pillsbury, Record, p. 30; Ryan, Record, p. 38); that the poles were badly out of alignment, not only with themselves, but with the poles of the telephone company and the electric railroad. (Hebb, Record, pp. 35, 36; Bartlett, Record, p. 42.)

The District Court found that repairs to the line through Essex had become necessary, and a new location desirable in connection with them. (Record, p. 20.) The District Court also found in regard to certain changes that were made by the appellee after the temporary injunction was obtained: "That the admitted changes in the location of some of the poles were only such as were necessary to keep the line in a reasonably safe condition, and that there have been no changes amounting to a change of the location occupied in 1884 and since." (Record, p. 21.)

Accordingly, on June 1, 1905, William Ryan, the foreman of construction of the appellee, presented to the selectmen of the town in behalf of the appellee a petition for a location for its poles and wires and license to maintain the same in the following named streets and highways of said town, namely: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions then occupied by the old poles and any changes in the locations to be made under the direction of the Board. (Ryan, Record, p. 37; Defendant's Exhibit 1, Record, p. 51.)

After receiving this petition the selectmen called a hearing for June 30, 1905, of the abutters on the streets in which the line is located, and the hearing was held on the day appointed. (Cogswell, Record, p. 44; Kimball, Record,

p. 42; Ryan, Record, p. 37; Complainant's Exhibit 5, Record, p. 46; Defendant's Exhibit A, Record, p. 47; Defendant's Exhibit D, Record, p. 48; Defendant's Exhibit F, Record, p. 49.) The sense of this meeting was against the granting of the petition. (Ryan, Record, p. 39.)

On July 10, 1905, at a meeting of the Board of Selectmen it was voted not to grant the petition and the appellee was so notified. (Cogswell, Record, p. 44; Defendant's Exhibit 6, Record, p. 46.)

Both the petition of 1902 (Defendant's Exhibit 3, Record, p. 45) and the petition of 1905 (Defendant's Exhibit 1, Record, p. 51) were for a "location", and were in the name of the New England Telegraph Company of New York; but the evidence makes it perfectly clear that the appellee is and always has been the owner of the line, that the people of the town thoroughly understood that the application was in behalf of the company that owned the line, and that what was wanted was permission to relocate under the supervision of the selectmen such of the poles as it was necessary to change in order to put the line in good condition. It appears that the New England Telegraph Company of Massachusetts is a part of a system of telegraph companies extending over the United States known to the public as the Postal Telegraph-Cable Company; that the lines in each State, however, are owned and operated by separate corporations organized under the laws of the State in which the lines are situated, each corporation being a distinct and independent company; that the various separate companies use the name "Postal Telegraph-Cable Company" merely as a trade-name in its relation with the public so as to get the advantage of the combined good-will of the association of separate companies. (Bruch, Record, p. 29.)

In accordance with this general scheme there were two separate corporations, the New England Telegraph Com-

pany, a corporation organized under the laws of Massachusetts, and the New England Telegraph Company, a corporation organized under the laws of New York. In neither case was the name of the State of incorporation a part of the corporate name. The New York company has no lines or property in Massachusetts, does no business there, and has nothing to do with the telegraph line in Essex (Bruch, Record, p. 28; Pillsbury, Record, p. 30), and the Massachusetts company has no lines or property outside of Massachusetts (Bruch, Record, p. 28), and no relation with the New York company other than an arrangement for transferring interstate business and the common use of the name "Postal Telegraph-Cable Company" in its relation with the public. While in its relations with the public the Massachusetts corporation uses the name "Postal Telegraph-Cable Company" in all formal transactions and in relation to the construction, operation and maintenance of its line and in its relations to the State, the Massachusetts corporation uses its charter name, The New England Telegraph Company, and describes itself as of Massachusetts. (Bruch, Record, p. 29.)

Mr. Pillsbury, who dictated the petitions, was not an officer of the New York corporation, and had nothing to do with it. (Pillsbury, Record, p. 30.) The line passing through Essex was built, maintained and operated by the Massachusetts company (Bruch, p. 28), and there was no reason for making this petition in the name of the New York company. As a matter of fact the petition referred to the line owned by the Massachusetts company. (Pillsbury, Record, pp. 30, 32.) It was made in behalf of the Massachusetts company (Pillsbury, Record, p. 32), and the description "of New York" was a mere slip of the pen (Bruch, Record, p. 29); or an error of nomenclature (Pillsbury, Record, p. 30); or a clerical error. (Ryan, Record, p. 37.)

The petitions themselves show that what was wanted was a designation of positions to be occupied by new poles needed for the line already running through Essex, the new poles to occupy practically the positions occupied by the old poles, and the selectmen to have the direction of any changes that might be made in the positions. (Defendant's Exhibit 3, Record, p. 45; Defendant's Exhibit 1, Record, p. 51.)

At the hearing on June 30, 1905, which the selectmen gave on the petition of 1905, the appellee was represented by its foreman of construction, Mr. Ryan. He testified that at this hearing either the chairman of the Board of Selectmen or the attorney for the town asked him if the petitioner was a foreign corporation, and what was meant by asking for a location rather than a relocation; that the witness stated to the board and those present at the hearing that the description of the petitioner and the use of the word "location" were mere clerical errors, and stated just what the petition asked for, and asked to have it returned so that the clerical errors might be corrected. (Ryan, Record, p. 37.) He further testified that he again asked leave to take the petition back to Superintendent Pillsbury to have the errors corrected. (Ryan, Record, p. 37.) Sargent, called as a witness for the town, remembered that Ryan had said at the hearing that these were errors. (Sargent, Record, p. 40.) Burnham, another of the town's witnesses, remembered Ryan saying that the different names referred to the same company, that is, the one with the big poles, and the one already there in the town, and did not understand that it was for a new line of poles. (Burnham, Record, p. 42.)

So, too, Selectman Kimball, testifying for the town, stated that Mr. Cogswell, the chairman at this hearing, explained who the petitioners were, and referred to them as "the Cable Company going through the town", with

the statement that he did not know the name, that they went under a variety of names, but that that was the line referred to, and made it clear that it was the same company that owned the line then there, and that what they wanted was a location for that same line. (Kimball, Record, p. 43.) Cogswell, himself, testified that someone at the hearing asked what company was petitioning, and that he read the name on the petition and said "it is the company that has the large poles in the town". (Cogswell, Record, p. 45.)

There is no dispute that "the company with the large poles" is the appellee.

The foregoing evidence makes it clear that the selectmen thoroughly understood what was intended to be asked for by the petition of 1905, and in whose behalf it was presented. It is also clear on the evidence that it would not have made a particle of difference in the action of the selectmen upon this petition if it had been signed "New England Telegraph Company of Massachusetts" and had used the word "relocation" instead of "location". When Foreman Ryan asked to have the application returned so that the signature and term "location" might be changed, he was told that it was not necessary to have the petition returned, and it was not returned to him. (Ryan, Record, pp. 37, 38, 39.) Ryan asked the Board if they wished him to take the application back to Mr. Pillsbury and was told that it did not matter, that they would not consider any application (Ryan, Record, pp. 38, 39); and Selectman Kimball admitted that if the petition had been in the name of the Massachusetts company it would not have been granted. (Kimball, Record, p. 43.) The same witness testified that at a conference held after the hearing in the office of Superintendent Pillsbury at Boston, at which representatives of the appellee, and its counsel, Mr. Wardner, the selectmen and their counsel, Mr.

Richardson, were present, he remembered Mr. Wardner's asking the selectmen whether it made any difference if the petition used that name and asked for a location, and that the reply was that it did not make any difference; that the object of the town was to discover the right which any telegraph company had to use its streets, and if it had a right, well and good, and if it did not have a right, the town was not going to have any telegraph company there. (Kimball, Record, p. 43.) This witness was asked on cross-examination whether he did not meet Mr. Ryan shortly after the meeting of June 30, and whether he did not say to Mr. Ryan that the form of the petition made no difference; that the fact that they asked for a location and the fact that they applied in the name of the Telegraph Company of New York was not of importance, but that the idea was to dispute the right of the Telegraph Company to be there, and that was why they refused the petition. Witness replied that he did not remember of saying it made no difference; he may have said he wanted to raise the question of the right of the company to be there, whatever company it might be that owned those poles and wires. (Kimball, Record, p. 44.) Ryan testified that at the conference in Mr. Pillsbury's office Mr. Richardson, the town's counsel, told Mr. Pillsbury that they did not propose to have any poles of the New England Telegraph Company in the town on any street if they could prevent it, and that Mr. Kimball said that there were no streets they wanted the company to use in the Town of Essex; that the upshot of the conference was that the company could not set any poles in the Town of Essex unless the court said so. (Ryan, Record, pp. 37, 38.)

Superintendent Pillsbury testified that counsel for the selectmen, Mr. Richardson, at the conference in Mr. Pillsbury's office, stated to him that the town wanted the poles taken entirely out of town, would not grant the com-

pany's petition, and would prevent construction work if necessary by force. (Pillsbury, Record, pp. 30, 31.)

Ryan testified that he had several interviews with different members of the Board of Selectmen after the public hearing on June 30, 1905, and prior to July 11, 1905, and that he asked the chairman if he had any objection to the company's going ahead and repairing the line as it stood, replacing the poles with new poles, and he said that if the company made any attempt to do any work in the town, the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested. (Ryan, Record, p. 37.)

The District Court found that the selectmen's "refusal to grant the application was not upon the ground that it was applied for in the name of the New England Telegraph Co. of New York instead of in the name of the plaintiff, but was a refusal, upon other grounds below appearing, to grant the plaintiff or any company connected with it, any location within the town. At a subsequent conference between the selectmen and the representatives of the plaintiff it was stated to the plaintiff, by or on behalf of the selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the town. Also that the selectmen wanted the poles taken entirely out of the Town and would prevent construction work by force if necessary. The selectmen or their chairman were asked if there was objection to the repair of the line as it stood, merely replacing old poles with new ones. The reply was, that there was objection, and that any work by the company within the Town would be stopped." (Record, pp. 20, 21.)

Thereafter the bill of complaint was filed, as above stated, on July 31, 1905. Between the filing of the bill

and the coming in of the town's answer and cross-bill the appellee did some construction and made some changes. Poles were renewed, and wherever it was found necessary new wire was put in and also new cross arms (Pillsbury, Record, p. 31), but the court found that the changes were only such as were necessary to keep the line in a reasonably safe condition, and that there had been no changes amounting to a change of the location occupied in 1884 and since. (Record, p. 21.)

STATUTES, FEDERAL AND STATE, WHICH HAVE, OR MAY BE CONTENDED TO HAVE, A BEARING ON THE QUESTIONS INVOLVED IN THE CASE.

The Federal Statutes that are material are the Act of Congress of July 24, 1866, and the Act of March 1, 1884. The Act of July 24, 1866 (14 Stat. 221, c. 230), as amended appears in the Revised Statutes as Sections 5263 to 5268 inclusive. The material sections are as follows: —

Section 5263:

> " Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

Section 5264:

"Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

Section 5266:

"Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section."

Section 5267:

"The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for

postal, military, and other purposes', or under this Title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected."

Section 5268:

"Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."

The Act of March 1, 1884, chapter 9 (23 Stat. 3; 2 Comp. St. p. 2708), is as follows:—

"Be it enacted, etc., That all public roads and highways while kept up and maintained as such are hereby declared to be post routes."

The Massachusetts Statutes which were in force when the appellee's line was built (1884) and which may be claimed to be applicable were Public Statutes, chapter 27, Section 49, and chapter 109, Sections 1, 2, 3 and 15, all of which are printed in full in the record at pages 24 and 25. All these laws remained in force until the revision of 1902. The material provisions of that revision are Revised Laws, chapter 25, Sections 54 and 56, and chapter 122, Sections 1, 2 and 26, all of which except 54 are printed in the record at page 26.

Section 54 of Chapter 25 is as follows:—

"The selectmen may, within their respective towns, permit telegraph and telephone lines to be laid under any way or square, and may establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph

or telephone, by electricity or otherwise, or for the transmission by electricity of light, or of heat or power except such as is used by street railway companies, by every person having authority to place poles, wires, structures and other appliances for any purpose in or under public ways or places, including all lines owned or used by said towns."

The only statute affecting the case passed after the revision of 1902 was chapter 237 of the Acts of 1903, which is printed in the record at page 26.

PRELIMINARY REMARKS.

The issue is this case is whether or not the Act of July 24, 1866, protects the telegraph company from being arbitrarily excluded by the Town of Essex from its streets.

The Act has been many times before this Court for interpretation. The appellee is well aware that the Act is very far from having taken away from the States all right to legislate in regard to the terms and conditions upon which streets and highways may be occupied by interstate and foreign telegraph lines.

The appellee does not dispute that notwithstanding the Act the property of such companies including their corporate franchises is subject to local taxation.

Western Union Tel. Co. v. *Texas*, 105 U. S. 460.
Western Union Tel. Co. v. *Attorney General*, 125 U. S. 530; 141 U. S. 40.
Leloup v. *Mobile*, 127 U. S. 640.
Postal Telegraph-Cable Co. v. *Charleston*, 153 U. S. 692.
Postal Telegraph-Cable Co. v. *Adams*, 155 U. S. 688.
Western Union Tel. Co. v. *Taggart*, 163 U. S. 1.
Western Union Tel. Co. v. *Gottlieb*, 190 U. S. 412.

Nor that a State or municipality if authorized by the State

so to do may charge such a telegraph company a reasonable rental for the use of its streets.

St. Louis v. *Western Union Tel. Co.*, 148 U.S. 92.
Postal Telegraph-Cable Co. v. *Baltimore*, 156 U.S. 210.

Nor that such telegraph companies are subject to the police power of the States, and therefore to State and municipal regulation and supervision, particularly with reference to the occupation of streets and highways by telegraph lines.

Western Union Tel. Co. v. *Pendleton*, 122 U.S. 347.
Western Union Tel. Co. v. *James*, 162 U.S. 650.
Western Union Tel. Co. v. *Richmond*, 224 U.S. 160.
Western Union Tel. Co. v. *New York*, 38 Fed. Rep. 552.
Richmond v. *Southern Bell Tel. Co.*,, 85 Fed. Rep. 19.

Nor that a State or municipality when duly authorized by the State has the right to charge such telegraph companies with the reasonable cost of inspection, supervision and regulation carried on under the police power.

Western Union Tel Co. v. *New Hope*, 187 U.S. 419.
Atlantic & Pacific Tel. Co. v. *Philadelphia*, 190 U.S. 160.
Postal Telegraph-Cable Co. v. *New Hope*, 192 U.S. 55.
Postal Telegraph-Cable Co. v. *Taylor*, 192 U.S. 64.

No question of taxation, rental, police regulation or charges are involved in this case. The record presents to this Court the bald question whether a telegraph company which for twenty years has occupied streets in a town, and has done everything in its power to comply with

State and municipal laws and regulations relating to the occupation of streets and highways by telegraph companies, can be arbitrarily excluded entirely by the town from its streets.

It will be convenient here to notice and dispose of certain minor points and details.

The bill alleges that the appellee prior to the construction of its line in Essex duly filed " with the Post Master General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of the United States, entitled ' An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and other Purposes ' approved July 24, 1866, and the amendments thereto ". (Record, p. 2.)

The appellant in its answer stated that it had no knowledge that the plaintiff duly filed such acceptance, and therefore denied the allegation and called upon the plaintiff to prove the same. (Record, p. 8.) The District Court found that the averment of the bill in this particular was sustained by the evidence (Record, p. 19), and it is agreed for the purpose of this appeal that the company and the New England Telegraph Company of New York have duly accepted the provisions of the Telegraph Act of Congress. (Record, p. 39.)

No attempt is made to dispute the fact that a large part of the business done over the appellee's line in the Town of Essex is interstate and foreign commerce, nor that in respect to a part of such business the appellee acts as a Government agent.

The record makes it clear that the appellee was incorporated to do, and has ever since done, an interstate and foreign telegraph business. The evidence establishing this fact and the finding of the District Court thereon

have already been set forth in this brief (see pp. 8 and 9) and appear on pages 19, 20 and 29 of the record.

It is not now open to question that such business is interstate and foreign commerce.

Pensacola Tel. Co. v. *Western Union Tel. Co.*, 96 U. S. 1.
Western Union Tel. Co. v. *Texas*, 105 U. S. 460.
Western Union Tel. Co. v. *Pendleton*, 122 U. S. 347.
Leloup v. *Port of Mobile*, 127 U. S. 640.
Western Union Tel. Co. v. *Alabama*, 132 U. S. 472.
St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92.
Western Union Telegraph Co. v. *James*, 162 U. S. 650.

It is equally clear that a telegraph company which has accepted the provisions of the Act of July 24, 1886, and pursuant thereto transmits Government messages at rates fixed by the Postmaster General becomes a Government agent.

Western Union Tel. Co. v. *Texas*, 105 U. S. 460.

The District Court found that the appellee in this case was engaged in transmitting interstate, international and Government messages (Record, p. 22), and, as has already been pointed out, Mr. Bruch, the treasurer of the company, testified that part of the business of the company was the handling of Government telegrams. (Record, p. 29.)

There can be no doubt therefore that the appellee came into the Town of Essex with its line of telegraph and has maintained it there since as a Governmental agency performing an important function of interstate and foreign commerce.

The appellee's rights under the Act of 1866 are of course conditional on its lines in the streets of the town not interfering with ordinary travel on those streets.

But no serious contention is made that there was any such interference.

While the town in its answer denied the allegation of the bill that the streets were of sufficient width to allow of the construction and operation of the line without inconvenience (Record, pp. 2, 9) the cross-bill contains no allegation that the line would involve any inconvenience or interference with travel on the streets. The town offered no evidence tending to show any such inconvenience or interference, and it made no such claim at the hearing in the District Court.

On the other hand the appellee did offer evidence tending to show that its line did not interfere with ordinary travel on the streets, and the District Court so found. (Record, p. 20.)

This Court will take judicial notice of the fact that the Town of Essex is a country village of not more than 2,000 inhabitants.

It is inconceivable that if there had been any interference with ordinary travel the line could have been maintained in the streets of the town six years without any objection whatever, and for more than twenty years without any attempt to procure the removal of the line.

There being no evidence in the record that the appellee's line interfered with ordinary travel on the streets, the finding of the District Court should not be disturbed.

In the District Court the contention was made that the streets upon which the appellee's line of telegraph is maintained are not post roads, on the theory that the Act of March 1, 1884, chapter 9 (28 St. 3), in making all public roads and highways kept up and maintained as such "post routes", did not make such roads and highways "post roads" under the Act of 1866.

Western Avenue, Main Street and Eastern Avenue, the streets in the town occupied by appellee's line (Bill of Complaint, par. 4, Record, p. 3; cross-bill, pars. 3, 8, Record, pp. 12, 13; Opinion of District Court, Record, p. 20), were and are public roads and highways kept up and

maintained as such (cross-bill, pars. 3, 8, Record, pp. 12, 13; Opinion of District Court, Record, p. 22), and are, therefore, "post routes" within the meaning of the Act of 1884.

The distinction attempted to be made by the appellant between "post routes" and "post roads" is without foundation.

In *Richmond* v. *Southern Bell Tel. Co.*, 174 U. S. 761, at page 763,

Mr. Justice Harlan said: —

> "Subsequently, by an Act approved June 8, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and parts of railways which were then or might thereafter be put in operation; all canals, and all plank roads; and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers were declared by Congress to be 'post roads'. 17 Stat. 308, c. 335. These provisions are preserved in Section 3964 of the Revised Statutes of the United States. By an Act approved March 1, 1884, 'all public roads and highways, while kept up and maintained as such' were declared to be 'post roads'. 23 Stat. 3, c. 9."

See also —

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92, 100.
Western Union Tel. Co. v. *Penn. R. R. Co.*, 195 U. S. 540, 559.

In *Western Union Tel. Co.* v. *Richmond*, 224 U. S. 160, at page 165,

Mr. Justice Holmes said: —

> "The Act of Congress gives to telegraph companies that accept its provisions the right to con-

struct, maintain and operate lines over the post-roads of the United States, such as the streets of Richmond concerned are admitted to be. Rev. Stats. Sec. 3964, Act of March 1, 1884, c. 9, 23 Stat. 3."

The courts have invariably treated the Act of March 1, 1884, as having made public highways and roads kept up and maintained as such post roads.

Ex parte Conway, 48 Fed. 77 (C.C. So. Carolina, 1891).

In re Matthews, 122 Fed. 248, 258 (D. S. E. D. of Kentucky, 1902).

City of Newcastle v. *Postal Telegraph-Cable Co.*, 152 Fed. 572 (C.C. Western Dist. of Pa. 1907).

Western Union Tel. Co. v. *Richmond*, 178 Fed. 310, 312 (Circuit Court, Eastern Dist. of Va. 1909).

Mackay Tel. & Cable Co. v. *City of Texarkana*, 199 Fed. 347, 348 (D. C. Western Dist. of Ark. Texarkana Div. 1912).

The statement of the court below "that 'post routes' as there used means anything different than 'post roads' I am unable to believe, in view of the decisions which have treated this enactment as an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8), to establish post offices and post roads", is clearly correct.

No question is made, as, indeed, none could be made, that either the Act of 1866 or the Act of 1884 are constitutional. The validity of neither act has ever been questioned and both have been treated by the courts ever since their passage as constitutional enactments under the power given by the constitution to Congress to regulate commerce with foreign nations and among the several States (Art. 1, Sec. 8, par. 3), and to establish post offices and post roads. (Art. 1, Sec. 8, par. 7.)

The case presents no difficulty as to the respective

rights of the abutters and the town in the streets in question. Both are well settled.

It is perfectly true, as alleged in the third and fourth paragraphs of the cross-bill (Record, pp. 12, 13), "that from time to time the defendant has established public highways within its borders and at its sole expense has maintained the same from time immemorial; that among those public highways so constructed and maintained are the following named streets: Western Avenue, Main Street and Eastern Avenue"; that no corporation or person whatsoever have any interest in these highways "except the inhabitants of the town who are abutters thereon and who own the fee in said streets, subject to the right of the public to pass and repass thereon". In other words, the fee in the streets in which the company's line is located is in the abutters, subject to the public easement, and this is the usual and customary state of things in Massachusetts. It is settled law in Massachusetts that where a public street or highway is laid out by public authorities over land belonging to private persons, the fee remains in the abutters and an easement in favor of the public is taken; that that easement includes not only the right of passing and repassing by travelers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, but also for the transmission of intelligence by telegraph lines consisting of poles and wires erected in the streets.

Pierce v. *Drew*, 136 Mass. 75.

It is clear that neither the State nor the Town of Essex owns land in the streets occupied by the appellee's line of telegraph, but, on the contrary, the fee in that land is owned by the abutters on those streets, and that those abutters and their predecessors in title received full com-

pensation for the use of said streets by the telegraph line when the land was appropriated for street purposes.

Pierce v. *Drew, supra.*

ARGUMENT.

I.

FROM PUBLIC STREETS AND HIGHWAYS WHICH ARE POST ROADS AND WHICH ARE NOT OWNED BY A STATE OR MUNICIPALITY THEREIN, BUT IN WHICH THE FEE IS OWNED BY ABUTTERS, SUBJECT TO A PUBLIC EASEMENT, INCLUDING THE OCCUPATION OF SAID STREETS AND HIGHWAYS BY A TELEGRAPH LINE, A TELEGRAPH COMPANY WHICH HAS ACCEPTED THE PROVISIONS AND OBLIGATIONS OF THE ACT OF JULY 24, 1886, AND WHOSE LINE DOES NOT INTERFERE WITH ORDINARY TRAVEL ON SUCH STREETS AND HIGHWAYS, CANNOT BE ABSOLUTELY EXCLUDED BY ANY STATE OR MUNICIPALITY, AND IN SAID STREETS AND HIGHWAYS SUCH A COMPANY HAS UNDER SAID ACT OF CONGRESS A RIGHT TO CONSTRUCT AND MAINTAIN ITS LINE OF TELEGRAPH, SUBJECT, OF COURSE, TO PROPER STATE AND MUNICIPAL REGULATION AND SUPERVISION.

In *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1,

this Court held that a bill in equity was properly dismissed in which bill the plaintiff, to which the Legislature of Florida had granted the exclusive right to establish telegraph lines in certain counties of the State, sought to enjoin the defendant from constructing a telegraph line in said counties on the right of way of a railroad which had granted the defendant company the right so to do. The court held that the State statute was in conflict with the Act of Congress of July 24, 1866, and Revised Statutes,

Section 3964, and was invalid. The court declared that the telegraph was an instrument of commerce and these acts of Congress constituted a legitimate exercise of the powers of Congress under the commerce clause of the Federal Constitution, and under the power conferred thereby upon Congress to establish post offices and post roads.

The court said: —

> "The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar attitude is to protect one part of the country from encroachments by another upon the national rights which belong to all. . . . The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction. It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The Statute of July 24, 1866, 14 Stat. at L., 221, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if

they accept the terms proposed by the National Government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, *no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.* [Italics ours.] . . . No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such an attempt has been made. *The use of public property alone is granted.* [Italics ours.] If private property is required, it must, so far as the present legislation is concerned, be obtained by a private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted. The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress."

If this case does not expressly decide that where the consent of the owner of the fee in the street is obtained a State cannot wholly exclude an interstate telegraph company from erecting its line in such street should it have become a post road, nevertheless when the court declared that the Act "does provide that whenever the consent of the owner is obtained no State legislation shall

prevent the occupation of post roads for telegraph purposes", and that "the use of public property alone is granted", the court unmistakably showed that in its opinion at least the Act of 1866 did give a telegraph company under such conditions a right to occupy the post roads of the United States, whether the post roads were public streets, railroads or anything else.

Indeed Mr. Justice Field in his dissenting opinion declared that such was the necessary effect of the opinion of the court. He said: —

> "Yet the doctrine asserted by the majority of the Court goes to this length: That, if the owners of the property along the streets consent to the erection of such lines by a foreign corporation, the municipality and the State are powerless to prevent it, although the exclusive right to erect them may have been granted by a State to a corporation of its own creation."

In *Western Union Tel. Co.* v. *Texas,* 105 U.S. 460, this Court held unconstitutional a law imposing on all telegraph companies doing business in Texas a tax for every message sent. The court said: —

> "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself."

The court then pointed out that telegraph companies which availed themselves of privileges conferred by the Act of 1866 were by its terms bound to give the United States precedence in the use of their lines at rates fixed the Postmaster-General and so "as to government

business, companies of this class become government agencies".

The court further said: —

> "The Western Union Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business."

See also —

Western Union Tel. Co. v. *Pendleton,* 122 U.S. 347.
Ratterman v. *Western Union Tel. Co.,* 127 U.S. 411.
W. U. Tel. Co. v. *Alabama,* 132 U.S. 472.
W. U. Tel. Co. v. *James,* 162 U.S. 650.

In *Pembina Mining Co.* v. *Pennsylvania,* 125 U.S. 181, at page 186, the court, after referring to the Pensacola case, said: —

> "And undoubtedly a corporation of one state, employed in the business of the general government, may do such business in other states without obtaining a license from them."

In *Western Union Tel. Co.* v. *Massachusetts,* 125 U.S. 530,

a bill was filed by the attorney general of the State at the relation of the State treasurer against the telegraph company to compel it to pay a tax levied by the State on the company's corporate franchise and to enjoin the company from the further transaction of its business until the tax had been paid. The bill was brought under Public Statutes, chapter 13, Section 54, authorizing the collection of the tax by information brought in the Supreme Judicial Court at the relation of the treasurer of the Common-

wealth, upon which information the court was authorized to issue an injunction restraining further prosecution of the business until the tax had been paid.

As was pointed out in a later case, *Western Union Tel. Co.* v. *Pennsylvania Railroad Co.*, 195 U.S. 540, the telegraph company was in occupation of the post roads of the State of Massachusetts, but whether railroads or the ordinary highways, or both, does not appear, although its right to be there was not controverted.

The court held that the Massachusetts corporate franchise tax in its relation to telegraph companies was valid, but that that part of it which provided for enjoining such companies from doing business in the State in case of the non-payment of the tax was invalid. The court said:—

> "The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy to the laws of the State under which it is organized. But the privilege of running the lines of its wires 'through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, . . . and over, under, or across the navigable streams or waters of the United States', is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. *While the State could*

not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there [italics ours], nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. . . . *This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions the right to run their lines over the roads and bridges which have been declared to be post roads of the United States.*" (Italics ours.)

The court, however, then pointed out that in the court below an injunction had been awarded against the company restraining it from the further prosecution of its business until the tax had been paid, and said: —

"The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or postroads of the United States'. It is found in this case that 2334.55 miles of the company's lines, out of 2833.05 on which this tax is assessed, are along and over such post roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State. *If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the*

State can have no authority to say it shall not be done." (Italics ours.)

The court accordingly reversed that portion of the decree of the court below which awarded the injunction.

If the post roads occupied by the telegraph company in this case were all railroads from which the telegraph company had obtained permission to occupy their rights of way, the State of Massachusetts could not, of course, under the authority of the Pensacola case, exclude the telegraph company from such post roads. On the other hand, if the post roads occupied by the telegraph company were public highways then if the right to occupy such post roads was not given by the Act of Congress of 1866, the State would have the right to exclude the telegraph company from such post roads, because, as pointed out by the appellant here on pages 40 to 44, inclusive, of his brief, any permission given to the telegraph company by the State to occupy such post roads could have been no more than a license and revocable at the pleasure of the State, so that the State would not only have the right of excluding the company from such streets for the purpose of collecting a State tax, but would have the right so to exclude it even arbitrarily. As it does not appear whether the lines of the telegraph company were upon railroad rights of way or upon public highways, the declaration of the court that the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads or stop the use of them after they were placed there must be taken to have been made with reference to both classes of post roads, and is not a dictum, but a necessary part of the decision.

In *Leloup* v. *Port of Mobile,* 127 U.S. 640,

it was held that a State cannot as a condition of doing

business within its jurisdiction, exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of July 24, 1866. The court said: —

> "Can a State prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. . . . Communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different states, it is commerce among the several states, and directly within the power of regulation conferred upon Congress and free from the control of state regulations except such as are strictly of a police character."

The litigation which arose between the City of St. Louis and the Western Union Telegraph Company is particularly instructive. The city passed an ordinance requiring telegraph companies to pay $5 per pole for using the streets, alleys and public places of the city. In the suit brought by the city against the Western Union Company to recover the tax in the Circuit Court for the Eastern District of Missouri (E. D.) the court held that the ordinance was obnoxious to the commerce clause of the Federal Constitution.

St. Louis v. *Western Union Tel. Co.*, 39 Fed. 59.

This decision was reversed by this Court in —

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92.

This Court, while holding that the statute did not

authorize a telegraph company to enter upon the private property of an individual and appropriate it without compensation, nor to enter upon property of a public nature belonging to a State without compensation, and that this rule extended to streets and highways, and that the City of St. Louis was entitled to charge a reasonable rental for the occupation of its streets by the telegraph company, nevertheless quoted with approval that passage of the opinion of this Court in *Western Union Telegraph Co.* v. *Massachusetts* which declares that a city could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, and further said: —

> "Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; *that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts* [italics ours], and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

There was a rehearing on the question whether the city had the right to charge a rental under its charter, and its right was affirmed.

St. Louis v. *W. U. Tel. Co.*, 149 U. S. 465.

The case then went back to the Circuit Court to deter-

mine, on the above principles, what, if anything, the city might recover of the company.

St. Louis v. *W. U. Tel. Co.*, 63 Fed. 68.

Judgment was entered for the defendant. Among other things the court at page 73 said: —

> "The defendant company is in the city, with its poles and wires on the streets, under the paramount authority of an act of the federal congress. It comes as a governmental agency, in performing an important function of interstate commerce. It neither asks nor can the city demand any permit or license to be and remain on such public highway. It has the right to demand the use of the plaintiff's streets and alleys, and the plaintiff must submit to such use with or without an ordinance."

If, as the appellee interprets the decision of this Court in this case, it means that the State or city can absolutely exclude a telegraph line from its streets, it could make the right to occupy them conditional on the payment of any amount the city might see fit to require, and it would not lie in the power of this Court or any other court to pass upon the reasonableness of the amount. The inquiry would distinctly not be open in the courts. The very fact that this Court went into the question of the reasonableness of the rental necessarily implies a negation by reason of the Act of Congress of 1866 of the absolute right of exclusion, otherwise there would have been no Federal question. The declaration of this Court that the occupation by this interstate commerce company of the streets cannot be denied by the city, constitutes the very foundation of the court's decision and of its jurisdiciion over the case.

In *Postal Tel. Cable Co.* v. *Charleston*, 153 U. S. 692, the court affirmed the validity of a city ordinance providing that telegraph companies should obtain a license for doing intra-state business and not including business done to or from points within the state or business done for the United States Government, the ordinance also requiring the telegraph company to pay $500 for the license. The court holding that while a state could not exclude a foreign corporation doing interstate commerce or acting as an agent of the United States government, or attach conditions to the exercise of its franchise, this doctrine did not apply to the intra state business of such a corporation.

In a similar case the court held that such legislation by a State was valid "if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." "But", the court said, "a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions."

See *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688, 696.

In *U. S.* v. *Union Pac. Ry.*, 160 U. S. 1, it was held that a contract between the railroad and the Western Union Telegraph Company whereby the former attempted to give the latter exclusive privileges on the railroad right of way and undertook not to permit other telegraph companies to use its right of way except with the consent of the Western Union Company, was void as being in conflict with the Act of July 24, 1866, which, the court at page 41 said, "gave every telegraph company, organized under State laws and accepting its provisions

the right to erect its poles and wires upon the post roads of the United States".

In *City of Richmond* v. *Southern Bell Tel. & Tel. Co.*, 78 Fed. 858,

the company sought to enjoin the city from interfering with the company's poles and wires. The city professed to act under a city ordinance imposing a number of conditions on the company, among others that the poles and wires should only be permitted to remain on condition that the company should first have petitioned for and received permission to erect its poles in accordance with the conditions of the ordinance. A demurrer was overruled. The court at page 860 said:

> "The defendant also claimed in its written demurrer filed in this cause that, if said Act of Congress (July 24, 1866) was intended to give to a telegraph company the right to erect poles and run wires along the streets of the city of Richmond without the consent of said city, such legislation was unconstitutional and void. This position was abandoned in the argument, and it was conceded that such act was constitutional; that all streets of the City of Richmond which are letter carrier routes are post roads within the meaning of said act; and that, under the same, a telegraph company can obtain a right of way for its poles and wires through and along the streets of a city without the consent of a municipality. These admissions are based on the decisions of the Supreme Court of the United States."

Citing *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 1.
Tel. Co. v. *Texas*, 105 U. S. 460.
Tel. Co. v. *Mass.*, 125 U. S. 530.
St. Louis v. *Tel. Co.*, 148 U. S. 92; 149 U. S. 465.

The court further said: —

"I think it is plain that the complainant, under the allegations in the bill contained, is a corporation entitled to exercise all the functions granted to telegraph companies under the laws of the state of New York, and that, under the act of Congress referred to, it has the privilege of running its lines through and over the streets of the city of Richmond, that are post roads of the United States, and that said city has no right to prevent it from so doing. While it is true that telegraph companies claiming the right under the laws of the United States to enter the territory of a state, and erect their poles and lines therein, must pay their due proportion of taxes, and submit to the ordinary reasonable regulations of the state and municipal authorities whose highways they use, and whose protection they claim and receive, still it is also true that neither the state nor the municipal authorities can prohibit them from entering their respective jurisdictions, nor require them to remove therefrom after they have established their lines. Such companies must submit to proper and reasonable local regulations, but they will not be expected to acquiesce in a city ordinance, not intended to regulate its management, but passed for the purpose of destroying its existence."

After the overruling of the demurrer (see 78 F. R. 858) the defendant filed its answer. The cause came to a full hearing and the Circuit Court decreed that the company had, under the Act of July 24, 1866 (which is an authority paramount and superior to any State law or city ordinance in conflict therewith), the right to construct, maintain and operate its lines over and along the streets and alleys of the City of Richmond, both those now occupied by the complainant company and those not so occupied, and to put up, renew, replace and repair its

lines, poles and wires over and along said streets and alleys as well as to maintain, construct and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city was enjoined and restrained from cutting, removing or in any way injuring said lines, poles and wires and from preventing or interfering with the exercise of said rights by said company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights.

The defendant then appealed to the Circuit Court of Appeals.

City of Richmond v. *Southern Bell Tel. & Tel. Co.*, 85 F. R. 19.

In the Court of Appeals the constitutionality of the Act of Congress of 1866 was recognized and admitted and that all streets which were letter carrier routes were post roads of the United States, and that under the Act of 1866 a telegraph company could obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality.

As to the extent of the protection of the Act of Congress, the court said: —

> "It is, therefore, subordinate to the public use. The privileges of this act, 'like any other franchise, are to be exercised in subordination to public as to private rights'. . . . These privileges must be enjoyed, subject to the lawful exercise of the police power."

The court further said: —

> "Streets and alleys in a city are the public property placed under the supervision and control of the municipality, the representative of the sovereign power. They exercise this supervision and control for the

benefit of the whole public, those living upon and those passing through such streets and alleys. And in the exercise of this supervision, which is the police power, they must see to it that the rights of the public and of private persons are not infringed. The complainant, under the act of Congress, has the right to use these highways. Neither the State nor any municipality can prevent it. . . . But this use must be subordinate to the rights of the public, must not endanger those rights. And as the municipality is the guardian of the public in this regard, it can establish such lawful provisions as may regulate the use, always, however, avoiding such regulations as will make the use burdensome and intolerable, and so practically impossible."

The court reviewed the provisions of the ordinance and finding that they appeared to have been stimulated by a desire to oppress and control, perhaps defeat, the existence of the complainant, held them to be not a lawful exercise of the police power.

The case went to the Supreme Court on certiorari and was reversed solely on the ground that the complainant was not entitled to the benefits of the Act of 1866, not being a telegraph company.

Richmond v. *Southern Bell Tel. & Tel. Co.*, 174 U. S. 761.

In *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239,

the telegraph company sought to restrain the railroad company from interfering with the plaintiff's rights in its telegraph line along the defendant's railroad. The suit was brought in the Circuit Court and the defendant attempted to remove it on the ground that it arose under the Constitution and laws of the United States. It was

held that the bill properly construed asserted that the right to maintain the telegraph company's line along the defendant's railroad was based upon a contract and not upon the Act of 1866. This Court said at page 243:—

> "It was not argued by counsel for the Telegraph Company that the Telegraph Company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; but it does provide, *that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.*" (Italics ours.)

The court further said:—

> "It was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

In other words, a railroad right of way is private property and in the absence of the owner's consent a telegraph company has no right under the Act of 1866 to enter upon such property and construct and maintain there its line of telegraph. There is nothing in this opinion which denies that a telegraph company has a right under the Act of 1866 to erect and maintain its line of telegraph in a public highway, which is a post road, if as against the private owner of the fee in the highway the

telegraph company, as in the present case, has a right to erect and maintain such a line. On the contrary, that a telegraph company has such a right seems expressly declared in the italicized portion of the above quotation from the court's opinion.

In *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412, the questions involved were similar to those involved in the case of the *Western Union Telegraph Co.* v. *Massachusetts, supra.*

The court considered the Massachusetts case at length, and at page 423 said: —

> "These propositions were laid down: That the company owed its existence as a corporation and its right to exercise the business of telegraphy to the laws of the State under which it was organized; that the privilege of running the lines of its wires over and along the military and post roads of the United States was granted by the Act of Congress, but that the statute was merely permissive and conferred no exemption from the ordinary burdens of taxation; that the State could not by any specific statute prevent a corporation from placing its lines along the post roads or stop the use of them after they were so placed, but the corporation could be taxed in exchange for the protection it received from the State upon 'its real or personal property as any other person would be'."

In *Western Union Tel. Co.* v. *Pa. R. R. Co.*, 195 U. S. 540,

the telegraph company sought to prevent the railroad company by an injunction from removing from various railroad company's rights of way the telegraph lines of the plaintiff. The bill was in aid of an action at law to condemn a right of way for the plaintiff's lines on the

defendant's right of way. This Court held that the Act of 1866 did not confer upon telegraph companies the right to enter upon private property without the consent of the owner, or grant any right of eminent domain, and that the bill should be dismissed.

The court, after stating the contention of the telegraph company, said: —

> "The railroad company denies this construction, and asserts that the act gives the consent of the Government to telegraph companies to construct lines through its public domain and over and along its military post roads, which are not the property of private corporations, and across navigable streams and waters. The act gives no right, the railroad company contends, to appropriate private property; but is an exercise by Congress of the national power over interstate commerce to secure telegraph companies from 'hostile state legislation or contracts violative of an announced public policy'. In other words, the contention of the railroad company is, that after the Act of 1866 was passed, it 'became impossible for the States, by any legislation, to exclude telegraph companies from the post roads'."

The court then referred to the Pensacola case, quoting at length from the opinion therein, and among other passages that portion which states that whenever the consent of the owner is obtained no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges, and that no question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made, and that the use of public property alone is granted.

Western Union Tel. Co. v. *Ann Arbor R. R. Co., supra,*

was fully discussed, and the court concluded that these two cases were conclusive on the question involved in the case before the court. The court approved the Massachusetts case, but held it entirely consistent with the Pensacola case and the Ann Arbor case.

In reference to the St. Louis case the court said: —

> "It is manifest that to hold there can be no entry upon property without payment of compensation, is not to decide that such entry can be made upon tender of compensation.
>
> "Certainly, as to private property or rights, the non-consent of the owner is a factor to be dealt with."

The complainant having argued that by the charters, under which the several railroad companies operated by the defendant were organized, they were expressly created public highways, and that they, therefore, became highways in the full sense of that term, the court said: —

> "Nor does the statute of New Jersey make those rights of way public property so as to subject them to such occupation under the provisions of the Act of 1866."

It is submitted that the foregoing decision is to be confined in its scope strictly to the question at issue, namely, whether under the Act of 1866 a telegraph company has a right to enter upon a railroad right of way and erect and maintain thereon its telegraph line, without the consent of the owner, provided proper compensation is paid. The court held that this could not be done.

It is to be observed that the telegraph company had gone upon the railroad company's right of way under a contract by which the telegraph company expressly agreed to remove its line on the termination of the contract, and the decision of the court was that in such a case the railroad company could not be prevented from removing, or

causing to be removed, the telegraph company's line. The case does not even decide that in the absence of such an agreement a railroad company could remove a telegraph line which had once been erected upon the railroad's right of way with the consent of the railroad company. In fact, the court noticeably refrained from deciding that point, as appears from its discussion of the cases of *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.* and *St. Paul, M. & M. Railroad Company* v. *Western Union Telegraph Company,* on page 572 of the opinion. Much less does the court deny, on the contrary there is in the opinion a clear implication that, so far as public highways are concerned, if there were no difficulty by reason of the consent of the private owners of the fee in the highways not having been obtained, a telegraph company would have the right, under the Statute of 1866, to erect and maintain its lines in such highways.

In *Western Union Tel. Co.* v. *Richmond*, 178 Fed. 310 (C. C. E. D. Va. 1909),

the telegraph company brought a bill to enjoin the enforcement of a city ordinance which provided that the city engineer should determine the size, number and other particulars of erecting poles; gave the committee on streets power to require the telegraph company to permit the wires of other companies to be strung on its poles upon terms to be agreed upon between the parties, with a provision for arbitration in case of failure to agree; gave the city the right to put its own municipal wires on the company's poles, subjected the company's wires to the inspection of certain officials of the fire department for the safety of insulations, etc.; provided a fine for each day's failure to obey an order of these officials; and provided for the removal of the poles and wires from a certain district and the substitution of underground conduits for the overhead system under the supervision of a committee, with a fine

for each week's failure to remove the overhead system within a designated period. The company having failed within the designated period to remove its poles and wires from the prescribed district and put them underground, the city threatened to impose and collect the penalties provided by the ordinance, in order to compel the company to do so.

The prayer of the bill was that the city be restrained from enforcing the provisions of any of the sections of the ordinance, and that the same might be declared to be unreasonable and illegal.

The bill was dismised. The court at page 319 said:—

> "That the complainant under the Act of Congress of July 24, 1866, was entitled to use the streets and alleys of the city of Richmond for purposes connected with its telegraphic system is now so well established that the citation of authorities to sustain it will not be indulged in. That it had this right independent of any action by the city of Richmond, and without proceeding under the provisions of any legislation by the State of Virginia is I think without question. To hold that the companies mentioned in said Act of Congress are required to obtain the consent of the States and municipalities through which they pass before they are entitled to so use the post roads of the United States is to admit the power of an authority other than the United States to control them, and indirectly, at least, to concede to such other authority the right to regulate interstate commerce. The object sought to be obtained, the benefits intended to be secured to the Government of the United States, through the regulation of the business mentioned, and the facilities for communication between its departments in distant sections of the nation, would be jeopardized if not destroyed by the antagonistic

> interests likely to be found in different localities, if the officials thereof possessed the power to determine when and how the right granted by the Federal Government should become operative. Such companies, under the legislation of the Congress, have the right to use the post roads of the United States in conducting their business; but such use is subject to the police power of the localities where they so operate, which, properly exercised by State and municipal authority, must be respected by complainant and by all companies similarly situated."

The court then considered the provisions of the city ordinance and held that they were a reasonable exercise of the police power.

The company appealed to this Court and the decision of the Circuit Court was affirmed.

224 U. S. 160.

Mr. Justice Holmes, delivering the opinion of the court, at page 168 said: —

> "The appellant says that it has the right to occupy the streets of Richmond under the act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. Neither branch of this proposition, as applied to this case, commands our assent. To begin with the end, while it is true that rules are not laid down in terms, they are implied so far as there need to be any."

The court then further considered this branch of the case, concluding with the statement that the ordinance was not unreasonable as a ground of arbitrary power.

The court then continued: —

> "In view of what we have said and the appellant's admission that it is subject to reasonable regula-

tion it would be unnecessary to consider its rights under the act of Congress but for some further complaint that the appellant's property is taken without due process of law. That complaint opens the question what property the appellant has. The Act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. . . . It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. . . . It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. . . . But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the Statute and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the city or State *where it owns the land.* [Italics ours.] . . . When the appellant without the right to exercise the power of eminent domain desires to occupy land belonging to others, *prima facie* it must submit to their terms. We assume, as we have said, that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles. If it demands, as a condition of its assent, as it does by § 6, that positions shall be reserved upon the poles for the city and by § 28 that provision shall be made for thirty per cent increase and that the city's wires shall be carried free of charge, one duct being reserved for them, it is within its rights. *Even assuming, as seems to be implied by*

some of the language in St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 104, 105; Western Union Telegraph Co. v. Attorney General of Massachusetts, 125 U. S. 530, that in consequence of the Act of Congress, the city is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable in view of the position of the parties." (Italics ours.)

It is to be observed that the city in this case made no attempt absolutely to exclude the telegraph company's lines from its streets. The ordinance itself provided that none of its requirements should in any manner interfere with or destroy the privilege of telegraph companies under the Act of Congress of July 24, 1866. The actual point decided was that the regulations contained in the ordinance were reasonable. This Court expressed no dissent from the view of the Circuit Court as to the plaintiff's rights under the Act, which it would naturally have done if it had dissented from those views. The court said that the statute gave the company no right to use the soil of the streets, even though post roads, as against private owners. It also said that the statute gave the company no right to use the soil of the streets as against the city or State, "where it owns the land", clearly implying it is submitted that when the city or State does not own the land, the statute does give such a right. While it was not necessary for the court to decide, and while it did not in fact decide, that the city was restricted to reasonable demands, it recognized that the proposition "seemed to be implied" in the St. Louis case and the Massachusetts case.

It is established law that while a municipality may charge a telegraph company which has accepted the provisions of the Act of Congress for municipal inspection, supervision and regulation, such charge must not exceed the reasonable expense of such inspection, supervision

and regulation; that if it does, the ordinance imposing it will be invalid; and that the question of reasonableness is reviewable in the courts.

W. U. Tel. Co. v. *New Hope*, 187 U. S. 419.
Atlantic & Pacific Tel. Co. v. *Philadelphia*, 190 U. S. 160.
Postal Telegraph Cable Co. v. *New Hope*, 192 U. S. 55.
Postal Telegraph Cable Co. v. *Taylor*, 192 U. S. 64.
Philadelphia v. *W. U. Tel. Co.*, 40 Fed. 615 (C. C. E. D. Pa. 1889).
Philadelphia v. *W. U. Tel. Co.*, 81 Fed. 948 (C. C. E. D. Pa. 1897).
S. C., 82 Fed. 797.
Philadelphia v. *W. U. Tel. Co.*, 89 Fed. 454 (C. C. A. 3d Cir. 1898).
Philadelphia v. *Atlantic & Pacific Tel. Co.*, 102 Fed. 254 (C. C. A. 3d Cir. 1900).
Philadelphia v. *Atlantic & Pacific Tel. Co.*, 109 Fed. 55 (C. C. E. D. Pa. 1901).
Nashville v. *Cumberland Tel. & Tel. Co.*, 145 Fed. Fed. 607 (C. C. A. 6th Cir. 1906).
Memphis v. *Postal Telegraph Cable Co.*, 139 Fed. 707 (C. C. W. D. Tenn. 1905).
S. C. on appeal, 145 Fed. 602 (C. C. A. 6th Cir. 1906).

The rule established by these cases is not reconcilable with the view that, notwithstanding the Federal Act, a telegraph company that has accepted its provisions cannot occupy the public highways without the consent of the State and municipalities, for, if such consent may be withheld altogether, it may be given on such conditions as the State or municipality chose to impose, including a money charge of any amount.

In *Western Union Telegraph Co.* v. *American Union Telegraph Co.*, Federal Cases No. 17,444,

the Circuit Court for the District of Indiana said that the railroad may have violated its contract with the plaintiff in permitting the defendant to go on the railroad's right of way, but held that this procedure could not be enjoined without "putting it in the power of railway companies operating post roads of the United States, by private agreement with a telegraph company, to defeat the purposes of the Act of 1866 . . . which was to make the erection of telegraph lines on the post roads of the United States (the consent of the owners of the right of way being obtained, or such right of way being condemned for telegraph purposes and compensation made therefor), free, even against hostile State legislation, to all corporations submitting to the conditions imposed by Congress. If, in such cases, State legislation cannot prevent the occupancy of post roads for telegraph purposes, by such corporations as are willing to avail themselves of the Act of Congress, much less could such results be rightfully obtained through private contracts of corporations."

In *Western Union Telegraph Co.* v. *The Mayor*, 38 Fed. 552 (C. C. S. D. N. Y. 1889),

it was sought to enjoin the City of New York from enforcing the provisions of a statute requiring poles and wires to be removed from the streets and elevated railway structures and to be put in conduits underground. The relief was denied as to the streets, but granted as to elevated railway structures. The court held that telegraph companies that have accepted the provisions of the Act of July 24, 1866, become, as to Government business, agencies of the general government; that all the streets of the city were post roads; that the elevated railroads were post roads; that a telegraph company was an instru-

ment of commerce; that its business was commerce itself; that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate commerce and that this power resided exclusively in Congress; that the complainant was protected by the national authority against any encroachment under State authority upon the rights and immunities expressly granted to it by the Act of Congress, or which it enjoyed in its dual capacity as an agent of the general government and an instrument of interstate and foreign commerce; that nevertheless persons and corporations enjoying grants and privileges from the United States, exercising Federal agencies and engaged in interstate commerce, are subject to a reasonable exercise of the police power, provided it does not unreasonably abridge or burden privileges and immunities derived from the Federal Government; that the regulation involved in the statute of New York did not impair the privilege granted to the complainant and was a legitimate exercise of the police power so far as the streets were concerned.

The court at page 558 said that the meaning of Congress was "to grant an easement that would afford telegraph companies all necessary facilities, and which to that extent should be beyond the reach of hostile legislation by the States", but held that the grant was not invaded by requiring the poles and wires to be removed from the streets and put underground.

Referring to the elevated roads, the court at page 560 said:—

> "That railway is an independent post road of the United States, in legal contemplation, carved out of the streets upon which its structures are erected; and State legislation, under whatever power it may be classified, is impotent to destroy the privilege given by the Act of Congress. The power to remove

the wires altogether from these structures, and to refuse to permit them to be kept there under any circumstances, is not regulation, but is equivalent to a complete denial of the privilege."

In *Ex parte Conway*, 48 Fed. 77 (C. C. S. C. 1891),

an employee of the Postal Telegraph-Cable Company was on habeas corpus freed from arrest on the charge that while he was engaged in constructing a telegraph line on the old State road between Charleston and Savannah he was obstructing a public road. The court proceeded on the ground that the company having accepted the provisions of the Act of July 24, 1866, and the road being a post road, the petitioner was acting under and by virtue of the laws of the United States.

In *Philadelphia* v. *W. U. Tel. Co.*, 40 Fed. 615 (C. C. E. D. Pa. 1889),

the court said that the city could not tax the company or exclude it from the city, but could subject it to proper regulations and supervision, with a view to the protection of persons and property.

In *Postal Telegraph-Cable Co.* v. *So. Ry. Co.*, 89 Fed. 190 (C. C. W. D. N. C. 1898),

which was a petition to condemn a right of way, the court said: —

"There is no doubt that any telegraph company incorporated by any State of the Union has the right to construct and maintain lines of telegraph along any railroad or other public highway in North Carolina, provided that they be so constructed as not to obstruct or hinder the usual travel thereon. . . . This same right to construct its lines along the right of way of post roads of the United States is given under the Act of Congress of 1866 to all telegraph companies accepting the provisions of that act."

In *Mich. Tel. Co.* v. *Charlotte,* 93 Fed. 11 (C. C. W. D. Mich. 1899),

it was held that an ordinance of the City of Charlotte requiring the complainant to remove its poles and wires from Main Street to an alley running parallel therewith was valid. The court assumed that the complainant was entitled to the benefits of the Act of July 24, 1866, but held that the statute was permissive only and was subject to the exercise by the city of the police power for the safety, health and convenience of the public. The court held, however, that the local authority could not arbitrarily interfere with the rights and privileges granted by the Act of Congress and under the guise of its conceded authority enact legislation which is really designed to accomplish some ulterior purpose beyond the scope of its legitimate power; and that while it had the power to compel the discontinuance of the line on Main Street under the circumstances, it could not do so without providing another practicable location.

In *Wichita* v. *Old Colony Trust Co.,* 132 Fed. 641 (C. C. A. 8th Cir. 1904),

it was held, affirming the decision of the Circuit Court (123 Fed. 762), that a statute of Kansas giving cities control over their streets did not impliedly repeal an earlier statute giving telegraph and telephone companies a right to use the highways of the State and give the cities the right of complete exclusion. The court said that if the later statute were held to repeal the earlier and give the right of complete exclusion, it would run counter of the Act of Congress of July 24, 1866, and would be void as to telegraph companies. The court assumed as a matter of common knowledge that the streets were post roads; that the telegraph companies had accepted the provisions of the Act of Congress, and at page 649 said: —

"It is therefore manifest that telegraph companies have at all times since the passage of the municipal charter act in Kansas been entitled, under this federal statute, to occupy the streets of cities of the first class in that state. Their 'right of way' there has not been dependent upon municipal consent. Notwithstanding this fact of common knowledge, the legislature of the state of Kansas has kept in force the statute which, it is urged by defendant, vests municipal authorities with power to grant and impliedly to refuse to grant such right of way. This statute cannot be construed as we are asked to construe it without rendering it void. If we adopt the construction that it is intended simply to vest in the local authorities police power over the subject, the act then becomes harmonious not only with other statutes of Kansas, but with this federal enactment."

In *Gans* v. *Ohio Postal Telegraph Cable Co.*, 140 Fed. 692 (C. C. A. 6th Cir. 1905),

the court, reversing the decision of the Circuit Court (137 Fed. 947, C. C. N. D. O. W. D. 1905) refused to enjoin the Board of County Commissioners from compelling the telegraph company to remove its line from the macadamized part of the Maumee Pike, but it appeared that they had provided the company with another location on the road, and the court fully recognized the rights of the company under the Act of Congress of July 24, 1866.

In *Mackay Tel. & Cable Co.* v. *Texarkana*, 199 Fed. 347 (D. C. W. D. Ark. Texarkana Div. 1912),

the company sought by bill in equity to enjoin the city from interfering with the construction by plaintiff of a telegraph line along the streets and alleys of the city. The plaintiff had applied to the mayor and city council

for leave to enter the city with its poles, wires, etc., tendering at the same time an ordinance, which, however, was never passed. On May 6, 1912, an ordinance was passed to become operative when accepted by the company. As the ordinance required underground construction in a larger section of the city than the company was willing to agree to, it refused to accept the ordinance. It was willing to put in some underground construction, but not as much as the city demanded. The company then proposed to put in its lines without any ordinance and brought this bill to prevent the city from interfering. The question came up on an application for a temporary injunction before defendant had answered. Affidavits were filed on both sides on the question as to whether underground construction was reasonably required in the disputed territory. The court held if a temporary injunction issued the plaintiff would get the whole relief sought by the bill in advance of a trial on the merits, and so denied the application. In the course of its opinion, however, the court referred to the Acts of 1866 and 1884 and said: —

> "Under those Acts of Congress, plaintiff is legally entitled to the use of the streets and alleys of Texarkana for the construction of its line." (Citing *St. Louis* v. *W. U. Tel. Co.*, 148 U. S. 92.) "The city may impose, under its police power, reasonable requirements on the company as to the manner of construction and maintenance of its line." (Citing *W. U. Tel. Co.* v. *Richmond*, 178 Fed. 310, and *W. U. Tel. Co.* v. *Richmond*, 224 U. S. 160.) "It does not lie exclusively within the power of either the company or the city to determine what is a reasonable requirement. The inquiry must be open in the courts, and must depend largely on the actual state of affairs in

the city." (Citing *St. Louis* v. *W. U. Tel. Co.*, 148 U. S. 105.)

In *Postal Telegraph-Cable Co.* v. *Chicopee*, 207 Mass. 341,

the court held that an injunction was properly refused which sought to enjoin the City of Chicopee from maintaining its electric light and fire alarm wires on the complainant's poles. But the court said that the line ran through public highways which were post roads and that "the plaintiff's predecessor in title" (a telegraph company)

> "had a right to construct and maintain such a line, and the plaintiff has a right to maintain it along public highways, under the U. S. Rev. Sts., § 5263. This right also is reaffirmed and extended to other classes of corporations by the R. L. c. 122, § 1. But it is subject to the right of cities and towns to make any reasonable local regulations in regard to the exercise of it. R. L. c. 25, § 54; c. 26, §§ 2, 6. These regulations, under the constitution of the United States, must be such as do not interfere with or regulate directly interstate commerce. These propositions are all well established by decisions of the Supreme Court of the United States."

In the case of

W. U. Tel. Co. v. *Superior Court*, 15 Cal. App. 679, the court said (p. 688):—

> "From the principles as thus affirmed, these incontrovertible propositions flow: 1. That telegraph corporations that have accepted the restrictions and obligations prescribed as to such corporations by Congress are not, primarily, beholden to any state for their right to transact a telegraph business therein;

that the sole source of their authority to enter any of the states or territories of the United States, where there are military and post roads and government waterways for the purpose of doing business therein is in the acts of the federal Congress. 2. That no State has the power, under the indicated circumstances, to exclude such corporations from the right or privilege of carrying on the business for which they are formed within its borders; that, while the State may impose upon such corporation, as it may upon all corporations of whatever kind or nature, organized and existing under the laws of another State, reasonable regulations, and to that end prescribe and require certain reasonable prerequisites to the exercise of the authority conferred on them by Congress to do business in such state, yet no state will be permitted, whether under the guise of regulation or otherwise, to enact any legislation the effect of which would or might, practically, be to prevent them from doing business in such state, or in effect result in an attempt on the part of such state to regulate commercial intercourse between its citizens and those of other states, or to control the transmission of all telegraphic correspondence within its own jurisdiction."

Under the Post Road Act of Congress a telegraph company cannot be prevented by a State or municipality from constructing its lines on the highways, and a lineman of such a company cannot be convicted criminally of obstructing the highway. Accordingly where a municipality orders the poles to be removed on account of street improvements, it must at the same time give new locations.

Carver v. *State*, 74 S. E. Rep. 556 (Ga.).

In the case of

Western Union Tel. Co. v. *Lakin*, 53 Wash. 326,

involving taxes, the court said: —

> "The company possessed under its federal franchise the right to do business upon all the roads and highways in the County of Pierce, whether within or without incorporated cities and towns. This right could not be denied. The power of the city was limited to its right to regulate the use of the privilege granted by Congress. It might provide that poles and wires should be carried over certain streets; that the wires should be carried on poles or buried in the ground; that travel should not be unreasonably obstructed, and that poles should be of certain height, and other like incidents. Beyond this it had no power to go. The ordinance relied upon did not grant a franchise."

The effect of the Act of 1866 as interpreted by these decisions is to authorize the use of public highways by telegraph companies which have accepted the provisions of the Act.

Of course the poles and wires must not obstruct travel. But in this case there is no pretence of such obstruction.

Moreover, telegraph companies, in their use of the streets, remain, notwithstanding the Act of Congress, subject to the police power of the States, and the complainant does not dispute the validity of State regulations governing such use, even to the extent of requiring the telegraph companies to apply for a permit. But the State cannot push its regulation to the point of exclusion. Against absolute exclusion the Act of Congress is a complete protection.

A careful consideration of the whole subject makes it clear that the Act must at least be given this effect.

When land is taken for a public highway, ordinarily only an easement is taken. The fee remains in the abutters, subject to the right of the public to use the land for a street. In most jurisdictions the easement does not include the right to use the street for telegraph lines. In Massachusetts the easement does include such right.

Pierce v. *Drew,* 136 Mass. 75.

In order to make use of a street for a telegraph line, two parties must, in the absence of Federal action, be reckoned with, the State and the owner of the fee. In Massachusetts the latter is eliminated; but in jurisdictions where the Massachusetts doctrine does not prevail the owner of the fee must be disposed of either by obtaining his consent, or by taking his rights by the exercise of the power of eminent domain, which power telegraph companies have in some States, but not in others.

As the Act of 1866 does not confer on telegraph companies that have accepted its provisions any power of eminent domain, it is helpless to afford any assistance to them where the owner of the fee has not been eliminated in one or other of the above ways. Whatever rights in streets it guarantees are confined to cases where the owner of the fee is eliminated and only the State, or what is the same thing, its municipalities, remain to be dealt with. Clearly in such cases the State has the right to give telegraph companies the authority to use its streets. The Federal Government could not say to a State "You shall not allow telegraph companies to use your streets." When a State has granted such a right to a telegraph company, it has all the authority it needs to erect and maintain its lines in the streets of the State. As the Federal Government could not prevent this, to withhold its permission would be of no avail and to extend its permission would be superfluous. Obviously, therefore,

the Act of 1866 was not intended to deal with such a situation.

If, however, a State, the owner of the fee being out of the way, should decline to permit the use of its streets by telegraph companies, then there would be occasion for the Congress to declare, under its authority to regulate interstate and foreign commerce and under its authority to enact postal laws, that the post roads of the United States should under proper safeguards be free to telegraph companies. This, the complainant contends, was precisely the intent and effect of the Act of 1866. If this is not so, it is difficult to see what Congress did intend by the Act or what possible effect it could have.

It may be suggested that the Pensacola case is an instance of what the Act could effect, apart from the above situation. In that case the Supreme Court held invalid a law of Florida attempting to give a certain telegraph company exclusive rights in one of the counties of the State. But the decision would have been just the same had the Act of 1866 never been passed. A State cannot exclude a corporation from doing business within its borders if the business is interstate commerce.

Paul v. *Virginia*, 8 Wall.
Pensacola Tel. Co. v. *W. U. Tel. Co.*, 96 U. S. 1.
Pembina etc. Mining Co. v. *Pennsylvania*, 125 U. S. 181.
Horn Silver Mining Co. v. *New York*, 143 U. S. 305.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 33–35.

The result of the Florida statute would have been to exclude all telegraph companies but one from doing any business whatever within the designated county, and as against telegraph companies doing an interstate business would have been bad on the above principle.

Another suggested answer to the question "What could be the effect of the Act of 1866?" is that it prevents railroads which are post roads from granting exclusive privileges on their right of way to particular telegraph companies, as in the Union Pacific case.

But here again the Act was not needed. Contracts for such exclusive privileges would be void as being in restraint of trade and against public policy, in the absence of any such Act.

W. U. Tel. Co. v. *B. S. W. Ry. Co.*, 11 Fed. Rep. 1.
W. U. Tel. Co. v. *B. & O. Tel. Co.*, 19 Fed. Rep. 660.
B. & O. Tel. Co. v. *W. U. Tel. Co.*, 24 Fed. Rep. 319.

Of course it is not unusual for a legislative body to enact into a statute a previously existent principle of the unwritten law. But it is to be remembered in connection with this statute that no telegraph company can make use of its benefits without making extreme concessions to the Government, *i. e.*, submitting to have the Postmaster General fix rates for Government business and consenting to have its line taken over by the Government at the latter's option. Surely Congress and the telegraph companies, for whose benefit the Act was supposed to be passed, must have believed that it was conferring real and substantial privileges, else so extreme a consideration would not have been required. It is difficult to believe that telegraph companies, practically all of which have accepted the provisions of the Act, would have done so and thereby made such great concessions, when they really got nothing in return — the Act merely declaring existing principles of law; one of which at least, namely, that forbidding contracts for exclusive privileges on railroads, the telegraph companies would have preferred to see abolished rather than reaffirmed, if the frequency with which they tried to make such contracts be any criterion.

It is fair to conclude that, since so much was exacted of companies that accepted the Act, the companies expected and Congress intended to grant substantial privileges. The only conceivable privilege is protection against exclusion from the public highways.

II.

THE APPELLEE HAS COMPLIED WITH ALL REASONABLE REGULATIONS OF THE STATE OF MASSACHUSETTS AND THE TOWN OF ESSEX RELATING TO THE OCCUPATION BY ITS LINE OF TELEGRAPH OF THE STREETS OF THE TOWN.

Assuming, as has already been shown, that under the Acts of Congress of July 24, 1866, and March 1, 1884, the appellee has a right to maintain its line in the streets of the town, it is nevertheless argued by the appellant that the appellee is not entitled to the aid of a court of equity, State or Federal, to prevent the removal of its line, unless it has complied with reasonable State and town regulations relating to the matter.

Conceding this to be so, the appellee contends that the evidence shows that it has done all it possibly could to comply.

It is not necessary to determine for present purposes whether the Massachusetts Statutes authorized the selectmen of Essex, if they saw fit, to refuse the appellee any location even although one could be given without incommoding the public use of the streets. If such is the effect of the statutes they would to that extent at least be invalid as being in contravention of the Acts of Congress, and the failure or refusal of the selectmen to give the appellee a location on the strength of such statutes would equally be in derogation of the appellee's rights, and it would not be required to acquiesce in such action on the part of the selectmen.

On the other hand, whether the Massachusetts Statutes authorize such action by the selectmen or not, in either event the appellee should comply with any other reasonable regulations applicable to the situation.

What regulations, then, were there, either by the State, the town, or the selectmen, to be observed by the appellee? Section 49 of chapter 27 of the Public Statutes (Record, p. 25) and Section 56 of chapter 25 of the Revised Laws (Record, p. 26) empowering selectmen to authorize citizens of the Commonwealth to establish and maintain in their towns poles, etc., for telegraphic communication, and Section 54 of chapter 25 of the Revised Laws (printed in full on page 22 of this brief) enabling selectmen to establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph by every person having authority to place poles, etc., for any purpose in or under public ways or places, may be dismissed from consideration, as the selectmen, so far as the record goes, do not appear to have taken any action whatsoever under either of these statutes. As regards Section 15 of chapter 109 of the Public Statutes (Record, p. 25) and Section 26 of chapter 122 of the Revised Laws (Record, p. 26), providing that no enjoyment for any length of time of the privileges of having or maintaining telegraph posts, etc., in, upon, over, or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement or raise any presumption of a grant thereof, it is to be observed that the situation in the present case apparently brings it within the principle of the line of cases which hold that the Federal courts will not sustain an action of ejectment by a property owner against a telegraph company where the property owner has stood by and delayed action until after the telegraph line has been completed, but that the property owner's remedy is for

damages only. (See cases on pages 3885 and 3886 of the seventh edition of Cook on Corporations.)

The underlying principle of these decisions is that the telegraph line, being a quasi-public property operated to give service to the public and to the United States, under the post-road Act of Congress, will not be treated the same as a private tresspasser, public interests being involved and the continuity of telegraph service for the public being necessary. In the same way it was held in

> *Union Pacific Railroad Co.* v. *Greeley,* 189 Fed. 1 (C. C. of Appeals, 8th C., 1911),

that by acquiescence a railroad company may be barred from claiming that telegraph, railroad and other public service corporations which have used for many years and are using a portion of the former's right of way are doing so without legal right. In view of the foregoing principles, it may be questioned whether in spite of Public Statutes, chapter 109, Section 15, and Revised Laws, chapter 122, Section 26, the erection and maintenance by the appellee of its line without objection on the part of the town, and the fact that the line has been in its present lacation for twenty years, the town would not now be barred from excluding the appellee's line from the streets of the town; but, however that may be, and even if it be assumed that the erection of its line by the appellee without objection on the part of the town and its long occupation of the streets of the town give the appellee no additional rights, still the result would not be effected, because the appellee has a right to maintain its line in the streets of the town independently of the length of time during which it has maintained its line in the streets of the town, and of the fact that the line was built with the acquiescence of the town.

The really pertinent statutory provisions are Public

Statutes, chapter 109, Section 3; Revised Laws, chapter 122, Section 2, and Acts of 1903, chapter 237. (See Record, pp. 25, 26.) The first two of these laws are identical and provide that the selectmen of a town through which the lines of a company are to pass shall give the company a writing, specifying where the posts may be located, the kind of posts and the height at which and the places where the wires may run. The selectmen are also empowered, after giving the company opportunity to be heard, to direct any alteration, after the erection of the lines, in the location of the posts, etc., and in the height of the wires. Chapter 237 of the Acts of 1903 retained the first of these provisions unchanged, but in addition required any company desiring permission to erect poles, etc., upon any public way to petition the selectmen therefor. Provision was made for a public hearing on such petition and for notice of such hearing to the abutters on the streets proposed to be occupied. In regard to alteration of locations after the erection of the lines there was no change from the earlier statutes except that if the company petitioned for such alteration it might be made without hearing or notice. The appellant assumes that under the Public Statutes and under the Revised Laws it was incumbent upon the appellee to make written application to the selectmen for the writing provided for in the statutes. But there is absolutely nothing said in those statutes about an application, much less a written one. Let it be assumed, however, that a written application was required. The appellant roundly declares on page 11 of his brief that: "The reason why no location and specifications were ever granted to this plaintiff was that it never applied for any." In support of this amazing assertion, so far as concerns the proceedings in 1884, before the line was built, the appellant relies on the statement of Bartlett, son of the chairman of the selectmen in 1884, that his

father (who was dead when this suit was brought), told him that the company had no location (Record, p. 41); on the statement of Raymond, the town treasurer, that they had no right, no location there (Record, p. 42); on the statement of Sargent, the town clerk, that he had examined the records from 1861 to 1902 and had not been able to find any record of a location granted to the company, and that he had heard Bartlett, the deceased chairman, say that the company had no rights to go through the town (Record, p. 40); on the statement of Kimball, a selectman, that he had examined the town records from 1861 to the present time and did not find any permit for a location of poles in the streets to the company (Record, p. 43); on the statement of Cogswell, a selectman, that Bartlett, the deceased chairman, told him that the company never had a location in the town (Record, p. 45); on the statement of Bruch, appellee's treasurer, that the company's minute book contained no record of a location in 1884 (Record, p. 29); on the statement of Pillsbury, the appellee's superintendent, that there was no record of any such permit in the company's books (Record, p. 31); and on the statement of Hebb, the appellee's foreman, that the selectmen of 1902 claimed the company did not have any permit or franchise through there. (Record, p. 35.)

The appellant states the evidence as it appears in the record and not as it is quoted in the appellant's brief, and omits those portions of the evidence relating to a supposed mutilation of the town records upon which it does not rely.

It is so obvious, that it only needs to be stated, that all that the above witnesses and the deceased chairman Bartlett purported to say was that no writing or permit was ever given by the selectmen to the appellee. The appellee does not dispute this. Although it contended at the hearing that on the evidence such a writing or per-

mit had been given it, it accepts the finding of the District Court to the contrary. (Record, p. 23.) There is nothing, however, in the above-stated evidence that even remotely tends to show that such a writing or permit was not applied for. It is entirely consistent with the proposition that there was such an application and that the selectmen either refused or failed to give the writing or permit requested.

Bartlett, employed by the appellee in 1884, as constructor, assistant superintendent and right of way man, testified that he applied in writing for a right of way through the Town of Essex; that he last saw the application in the hands of Mr. Bartlett, the chairman of the selectmen, that it contained the location of streets through which the line was to pass; that it was presented in June or July, 1884, at Mr. Bartlett's house before any line was constructed. (Record, pp. 32, 33.)

This evidence stands absolutely uncontradicted on the record and is precisely confirmed by the appellant's own witness Cogswell, who testified on cross-examination that he inferred from what Mr. Bartlett, the former selectman, said, that what he meant to say was that they had definitely acted on a request and had refused it. (Record, p. 45.)

It is submitted that the evidence conclusively shows that the appellee before its line was built made a written application to the selectmen of Essex for a location in the streets of the town and that nevertheless no writing or permit was ever given by the selectmen to the appellee.

The appellant comments on the fact that the appellee never "sought to compel the Selectmen by mandamus or otherwise to perform the duty apparently imposed upon them by these statutes to grant a location on some terms, if application were made" and asserts that "if application had really been made and refused, it seems incredible

that the plaintiff would not have asserted its rights under these provisions". (Appellant's Brief, p. 12.)

It is by no means clear that the selectmen, as the appellant assumes, were bound under the State statute to grant a location on some terms. There are strong intimations from the State Supreme Court that the word "shall" should be construed as "may" and that the selectmen would have the right to decline to give a writing or permit, even though there were no incommoding of the public use of the streets.

Suburban L. & P. Co. v. *Boston,* 153 Mass. 200.

But, however this may be, it is to be noted that appellee's witness Bartlett testified that he was told by the chairman of the selectmen, with whom he lodged his application for a location, that it would be granted. There is no contradiction of this evidence in the record. The statements of the appellant's witnesses referred to on pages 11 to 13 of the appellant's brief assert nothing more than that the appellee had no right to erect or maintain its line in the town. This would, from the town's point of view, be true, by reason of the lack of any permit from the selectmen, even if the chairman had assured the appellee's right of way man that the application would be granted. There is no reason, therefore, to doubt his testimony that such assurance was given. It is the only assumption reasonably consistent with the undisputed facts that the appellee immediately after the application was presented proceeded to construct its lines and did so without objection from anyone, and that no objection arose for seven or eight years afterward. (Record, p. 13, par. 8, and pp. 19–20; Bartlett, p. 33; Atchison, p. 33; Hazelton, p. 39.) It is easy to see that the appellee built its line in the full belief that it had the consent of all persons interested and lawfully might build such line, and it would have been singular indeed if it had sought by man-

damus or otherwise to compel the selectmen to grant what the appellee already fully enjoyed.

But in any event, assuming that the chairman never gave the appellee or any of its employees any assurance that the application would be granted, and that the application was in fact definitely and formally refused; and assuming that the selectmen were bound by the State law to grant a location on some terms and could have been compelled to do so by mandamus or otherwise, the appellee was, when it built its line, in the position of having, by its written application, done all it could to comply with the State regulations and of therefore being entitled, both under the Federal and State statutes, to occupy the town's streets with its telegraph. The right of the appellant to compel the selectmen by the judicial progress of mandamus, if such right existed, to give the appellee what the State statutes entitled it to have, did not constitute a State regulation to be complied with before the appellee could resort to the rights conferred on it by the Acts of Congress. The act or the failure to act of the Board of Selectmen, whether for this purpose they be regarded as the special tribunal created by Section 3 of chapter 109 of the Public Statutes, or as officers of the town, or as individuals, denied to the appellee the right it possessed under the Acts of Congress. The fact that at the same time the appellee was denied rights conferred on it by State statutes, which rights the selectmen could have been compelled to effectuate by appropriate judicial procedure, could not deprive the appellee, which had done its best to comply with all regulations relating to the matter, from standing strictly on its Federal right. It was not incumbent upon the appellee to compel the selectmen to do their duty. It had a right to say to the selectmen: "Whether the State statutes confer any rights upon us, and, if so, whether you have done your duty in relation to our application, we are indifferent; we claim the right to

erect our lines in your streets, not under any State statutes, but under the Acts of Congress. We submit to your right as the agents of the State to regulate our use of your streets, and we have asked you to exercise this power of regulation and tell us how and where to erect our poles and string our lines. You have refused or at least failed to do so. There is nothing left to us to do, so far as our Federal rights are concerned, except to locate our line as best we can ourselves. We shall, after its erection, expect to be bound by any reasonable regulation, but as against absolute exclusion we shall stand on the rights given us by the Acts of Congress, and invoke the aid of the Federal courts if it is sought to interfere with those rights."

In other words, the appellee, after the selectmen had refused or failed to indicate where it might locate its lines, although the appellee had done what it could to observe the State regulations relating to the matter, had the right to make the Federal grant effective by locating its line as best it could itself.

Having built its line, the appellee did not abandon its efforts to obtain from the selectmen a location for its poles and wires.

McCaffrey, a witness for the appellee, testified that in 1895, when the electric railroad came through the town, he went over the route with Kimball, one of the selectmen, and had him point out where the witness might remove the poles that were in the way of the railway track; that Kimball pointed out where to set the poles; that he made no effort to get a permit for this relocation, but declined to move any poles until the selectmen would show him where he could put them; that he moved about half the poles at this time. (Record, p. 34.) Kimball did not deny this and said that he told McCaffrey to put the poles sideways. (Record, p. 42.) James, a selectman, testified that only a few poles were moved and that as to these

the selectmen did not designate where they were to be reset. (Record, p. 41.)

It is obvious that Public Statutes, chapter 109, Section 3, which was then in force, did not require any writing or permit for the resetting of these poles, and that here again the appellee, whether few or many poles were moved, and whether the selectmen did or did not point out the new locations, was trying its best to conform to the regulations and to the ideas of the selectmen.

Again in February, 1902, the line being in a very bad condition and very seriously in need of reconstruction (Record, Hebb, pp. 35, 36), the appellee presented to the selectmen an application in writing for a location in the streets then occupied by the line, the new poles to occupy the same positions as the old ones and any changes in locations to be made under the direction of the Board. (Record, Hebb, 35, 36; and see pp. 45, 46.) No definite action was taken on this application (Hebb, Record, p. 36; Cogswell, p. 44), although Cogswell testified that he considered the Board's failure to act on the petition as equivalent to a refusal. (Record, p. 45.)

By the time the appellee's bill of complaint was filed its line in the town was in an exceedingly unsafe and dangerous condition and in extreme need of relocation, resetting and repair. The details of the condition of the line are fully set forth on pages 12 and 13 of this brief and need not be repeated here.

Accordingly in June, 1905, the appellee by its foreman Ryan again presented to the selectmen an application for a location in the same terms as the application of 1902. (Record, p. 37; Defendant's Exhibit 1, p. 51.) The selectmen, after a public hearing of the abutters, the sense of the meeting being against the granting of the application, voted not to grant it and so notified appellee. (Cogswell, Record, p. 44; Kimball, p. 42; Ryan, pp. 37, 39; Complain-

ant's Exhibit 5, p. 46; Defendant's Exhibit F, p. 49; Defendant's Exhibit 6, p. 46.)

The record justifies, indeed compels, the conclusion of the District Court that " no failure on the plaintiff's part to do anything which the town has the right to require under the Statutes, State or Federal, or can otherwise reasonably require, as a condition of giving the specification, appears. The plaintiff has been, at least since 1905, constantly in the attitude of requesting the town to give the specification ". (Record, p. 23.) As a matter of fact the appellee has been constantly in this attitude since before the line was built in 1884.

Several suggestions of the appellant in this connection may here be noted:

1. The appellant criticizes the above quoted passage from the opinion of the District Court because the court speaks of the applications of the appellee, as made to the town, whereas the selectmen, in fulfilling the duties imposed on them by chapter 237 of the Acts of 1903 and its progenitors, act not for the town, or as its officers or agents, but as an independent public board, representing the Commonwealth directly. (Appellant's Brief, pp. 14, 15.) This is quite true. But it appears conclusively that all of the appellee's applications were made, as they should have been, to the selectmen and not to the town; Bartlett, it is true, says he applied to the town (Record, p. 33), but it plainly appears from the rest of his testimony that he addressed himself to the selectmen, had all his conferences with them, and that they treated and acted on his application, as made to them in the usual course, and not to the town. It is not strange that in characterizing his acts he should have failed to distinguish between the selectmen as agents of the town, and the selectmen as an independent board, acting under specific statute.

McCaffrey's dealings in 1895 were quite obviously with

the selectmen (Record, p. 34) and the petitions of 1902 and 1905 were formally and correctly addressed to "The Honorable Board of Selectmen of the Town of Essex". (Record, pp. 45, 51.)

The District Court had its attention on the attitude of the appellee in making its several applications, and not on the capacity in which the selectmen were acting in receiving the application. Substituting the word "selectmen" for the word "Town", the accuracy of the court's statement is undisputable. Nothing turns on the distinction so far as present purposes are concerned.

2. The appellant (Brief, p. 13) calls attention to the fact that the petitions of 1902 and 1905 (Record, Exhibit 3, pp. 45, 46; Exhibit 1, p. 51) were in the name not of the appellee, but of the New England Telegraph Company of New York, another existing company, and asserts that "it therefore clearly appears affirmatively that the only petitions ever received by the selectmen were not from the plaintiff, but from a different company; and, negatively, that the plaintiff company, which it agreed was the owner of the lines [p. 17] never made any application for the writing referred to in the statute, and was never refused such a writing". (Appellant's Brief, p. 14.) It was also contended at the hearing in the District Court that the applications of 1902 and 1905 should have asked for a relocation rather than a location.

A conclusive answer to the first of these contentions is that it cheerfully ignores the application of 1884.

Bartlett, a witness for the appellee, testified in regard to this application that he was employed by the company; that he attended to procuring rights of way for the company; that he applied to the Town of Essex for the right of way; that the line through the town was the line of the company. (Record, pp. 32, 33.)

The first sentence of the condensed statement of evi-

dence is: "The New England Telegraph Company is hereinafter called the company and the Town of Essex is hereinafter called the Town."

It cannot be disputed that the application of 1884 was made by the appellee and in its name. As to whether the applications of 1902 and 1905 should have asked for a relocation rather than a location, it would seem clear that, inasmuch as the appellee had never received any writing or permit from the selectmen, the proper thing to apply to them for was a location.

But entirely apart from these considerations, both contentions are technical to a degree and are entirely without merit.

The evidence makes it perfectly clear that the appellee is, and always has been, the owner of the line of telegraph through the streets of the town, that the people of the town thoroughly understood that the application was in behalf of the company that owned the line and that what was wanted was permission to locate under the supervision of the selectmen such of the poles as it was necessary to change in order to put the line in good condition.

It appears that the appellee is a part of a system of telegraph companies extending over the United States, known to the public as the Postal Telegraph Cable Company; that the lines in each State, however, are owned and operated by separate corporations organized under the laws of the State in which the lines are situated, each corporation being a distinct and independent company; that the various separate companies use the name Postal Telegraph Cable Company merely as a trade-name in its relations with the public, so as to get the advantage of the combined good-will of the association of separate companies. (Bruch, Record, p. 29.)

In accordance with this general scheme there were two separate corporations, the New England Telegraph Com-

pany, a Massachusetts corporation, and the New England Telegraph Company, a New York corporation. In neither case was the name of the State a part of the corporate name. The New York company has no lines or property in Massachusetts, does no business there and has nothing to do with the telegraph line in Essex (Record, Bruch, p. 28; Pillsbury, p. 30), and the Massachusetts company has no lines or property outside of Massachusetts (Record, Bruch, p. 28), and no relation with the New York company other than an arrangement for transferring interstate business and the common use of the name Postal Telegraph Cable Company in its relation with the public. While in its relation with the public the Massachusetts company uses the name Postal Telegraph Cable Company, in all formal transactions and in relation to the construction, operation and maintenance of its line and in its relations to the State, the Massachusetts company uses its charter name the New England Telegraph Company and describes itself as of Massachusetts. (Record, Bruch, p. 29.)

Pillsbury, who dictated the petitions, was not an officer of the New York company and had nothing to do with it. (Record, Pillsbury, p. 30.) The line passing through Essex was built, maintained and operated by the Massachusetts company (Record, Bruch, p. 28), and there was no reason for making these petitions in the name of the New York company. They referred to the line owned by the Massachusetts company (Record, Pillsbury, pp. 30, 32), were made in behalf of the Massachusetts company (Record, Pillsbury, p. 32), and the description "of New York" was a mere slip of the pen (Record, Bruch, p. 29); or an error or nomenclature (Record, Pillsbury, p. 30); or a clerical error (Record, Ryan, p. 37.)

The petitions themselves show that what was wanted was a designation of positions to be occupied by new poles needed for the line already running through Essex, the

new poles to occupy practically the positions occupied by the old poles, and the selectmen to have the direction of any changes that might be made in the positions. (Record, Exhibit 3, p. 45; Exhibit 1, p. 51.)

Ryan, the appellee's foreman, testified that at the hearing on June 30, 1905, which the selectmen gave on the petition of 1905, either the chairman of the Board of Selectmen or the attorney for the town asked him if the petitioner was a foreign corporation and what was meant by asking for a location, rather than a relocation; that the witness stated to the board and those present that the description of the petitioner and the use of the word location were clerical errors, and that he stated just what the petition asked for and requested to have it returned so that the clerical errors might be corrected. (Record, p. 37.) He further testified that he again asked leave to take the petition back to Superintendent Pillsbury to have the errors corrected. (Record, Ryan, p. 37.) Sargent, the town clerk, called by the town, remembered that Ryan had said at the hearing that these were errors. (Record, Sargent, p. 40.) Burnham, another of the defendant's witnesses, remembered Ryan's saying that the different names referred to the same company, that is, the one with the big poles and the one already there in the town, and did not understand that it was for a new line of poles. (Record, p. 42.) Selectman Kimball, called by the town, stated that Cogswell, the chairman at the meeting, explained who the petitioners were and referred to them as "the Cable Company going through the town", with the statement that he did not know the name, that they went under a variety of names, but that that was the line referred to, and made it clear that it was the same company that owned the line then there, and that what they wanted was a location for that same line. (Record, p. 43.) Cogswell himself testified that some one at the hearing asked what company was

petitioning, and that he read the name on the petition and said: "It is the company that has the large poles in the town." (Record, p. 45.) There is no dispute that "the company with the large poles" is the appellee.

The foregoing evidence makes it clear that the selectmen were in no way misled by the fact that the petitions of 1902 and 1905 were in the name of the New England Telegraph Company of New York, or by the fact that they asked for a location, but on the contrary thoroughly understood what was intended to be asked for and in whose behalf. It is also clear that it would not have made a particle of difference in the action of the selectmen if the petitions had been in the name of the New England Telegraph Company of Massachusetts and had asked for a relocation. When foreman Ryan asked to have the application returned he was told it was not necessary, and it was not returned. (Record, pp. 37, 38, 39.) Ryan asked the Board if they wished him to take the application back to Pillsbury and was told it did not matter, that no application would be considered. (Record, pp. 38, 39.) Selectman Kimball admitted that if the petition had been in the name of the Massachusetts company it would not have been granted; that at a conference held after the hearing in Pillsbury's office, at which representatives of the appellee and its counsel, Mr. Wardner, the selectmen and their counsel, Mr. Richardson, were present, he remembered Mr. Wardner's asking the selectmen whether it made any difference if the petition used that name and asked for a location, and the reply was that it did not make any difference; that the object of the town was to discover the right which any telegraph company had to use its streets, and if it had a right well and good, and if it did not have a right the town was not going to have any telegraph company there. (Record, p. 43.) This witness was asked on cross-examination whether he did

not meet Ryan shortly after the meeting of June 30 and say to Ryan that the form of the petition made no difference, that the fact that they asked for a location and applied in the name of the New York company was not of importance, but that the idea was to dispute the right of the telegraph company to be there, and that was why the petition was refused. The witness replied that he did not remember saying it made no difference; he may have said he wanted to raise the question of the right of the company to be there, whatever company it might be that owned those poles and wires. (Record, p. 44.) Ryan testified that at the conference in Pillsbury's office, Richardson, the town's counsel, told Pillsbury that they did not propose to have any of the appellee's poles in the town on any street if they could prevent it, and that Kimball said that there were no streets they wanted the company to use in the town; that the upshot of the conference was that the company could not set any poles in the town unless the court said so. (Record, pp. 37, 38.) Pillsbury testified that at the conference in his office Richardson stated to him that the town wanted the poles taken entirely out of the town, would not grant the company's petition and would prevent construction work, if necessary, by force. (Record, pp. 30, 31.) Ryan testified that he had several interviews with the different selectmen after the hearing on June 30, 1905, and prior to July 11, 1905, and asked the chairman if he had any objection to the company's going ahead and repairing the line as it stood, replacing the poles with new poles, and the chairman said that if the company made any attempt to do any work in the town the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested. (Record, p. 37.)

The finding of the District Court upon this part of the case was as follows: "I find that their refusal to grant the

application was not upon the ground that it was applied for in the name of the New England Telegraph Company of New York instead of in the name of the plaintiff, but was a refusal, upon other grounds below appearing, to grant the plaintiff or any company connected with it, any location within the Town. At a subsequent conference between the Selectmen and representatives of the plaintiff, it was stated to the plaintiff, by or on behalf of the Selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the Town. Also that the Selectmen wanted the poles taken entirely out of the Town and would prevent construction work by force if necessary. The Selectmen or their Chairman were asked if there was objection to the repair of the line as it stood, merely replacing old poles with new ones. The reply was, that there was objection, and that any work of the company within the Town would be stopped."

3. The appellant contends that under Public Statutes, chapter 109, Section 3, Revised Laws, chapter 122, Section 2, and Acts of 1903, chapter 237, the selectmen of a town have no right to give the writing provided for in the statutes unless it is applied for and given before the erection of the proposed line; that as the appellee's line had already been constructed when it applied to the selectmen in this case the selectmen had no right to give the appellant the written specifications asked for as an original location; and that they had no right to give the specifications as a relocation because the right of the selectmen to relocate presupposes an existing valid location, which the appellee in this case did not have. (Appellant's Brief, p. 47.)

This contention cannot be supported:

a. The argument entirely ignores the unquestioned fact that, as pointed out on page 74 of this brief, the appellee did in 1884, before its line was built, apply in writing to the selectmen of the town for a writing specifying the location of its proposed line pursuant to Public Statutes, chapter 109, Section 3. The selectmen on any view of the statutes then had the right to give the appellant a location, but nevertheless refused or at any rate failed to do so.

b. Leaving out of consideration the application of 1884 and assuming that the appellant's construction of the Massachusetts Statutes is correct, then if the appellee derived no rights under the Acts of Congress there might be some force in the appellant's suggestion. But if as has been shown the appellee did have a right under the Acts of Congress to erect and maintain its line in the streets of the town, and if the appellee before availing itself of its Federal right as has been shown did do what it could to comply with State regulations and duly make application to the selectmen for a location and only availed itself of its Federal right to erect its line after its application proved fruitless, an entirely different situation is presented. If the State Statutes in such a case required the appellee before it could obtain specifications of location to take down its entire line and apply afresh, and if according to the State law the presence of the line in the streets of the town would be a nuisance and illegal unless this were done, then the State regulations in this respect were unreasonable and a plain infringement of the appellee's rights under the Acts of Congress.

c. Finally the appellee submits that the construction which the appellant seeks to put on the Massachusetts Statutes is not tenable. If such be the construction, it would follow that if a telegraph line had been lawfully

erected in the streets of a town in Massachusetts prior to the original enactment of the law, or if a telegraph company had a line on private land which was subsequently taken for a street, it could not obtain a permit from the selectmen unless it had first entirely removed its line. No doubt the law was framed with a view to what should be required of telegraph companies and the selectmen where it was proposed to erect a line of telegraph in the public streets, and the language of the statute is appropriate to this situation. But so extreme a construction as that contended for by the appellant is not required. It is probable that many lines of telegraph in Massachusetts have been erected in the streets without any permit having been issued by the selectmen of the town and without fault probably on the part of either the companies or the selectmen. To hold that in such cases the lines could not be legalized by the companies applying for and the selectmen giving the writing called for by the statutes would require a rigorous and technical construction of the statutes which should not commend itself to any court.

III.

THE SUIT IS PROPERLY BROUGHT AGAINST THE TOWN.

Attention has already been called to the appellant's contention that the selectmen in performing the functions imposed upon them by chapter 237 of the Acts of 1903, and its progenitors, act not for the town or as officers or agents of the town, but as an independent public board representing the Commonwealth directly. (Appellant's Brief, p. 15.)

This proposition is not disputed.

The appellant appears to assume that the action which the appellee seeks to enjoin would, if taken by the selectmen, have been in pursuance of the functions exercised

by them under the statute. (Appellant's Brief, pp. 46, 47 *et seq.*) This is an error. The appellee does not seek to enjoin the selectmen from refusing to grant its petition. What it does seek to enjoin is the removal of its line from the streets of the town.

The sole functions reposed in the selectmen by Public Statutes, chapter 109, Section 3, Revised Laws, chapter 122, Section 2, and Acts of 1903, chapter 237, were to determine first whether any location could be granted the appellee, without incommoding the public use of the streets, and, if it could, in the second place, where the poles should be set, and in the third place, after the erection of the line, when and what changes should be made. In regard to a telegraph line unlawfully in the streets, or for that matter in regard to any obstruction in the streets, they had as an independent board created by the above statutes no right or duty to take any action whatsoever. Having refused the appellee's petition their jurisdiction as such board was at an end.

Now, it is the law of Massachusetts that any structure within the limits of a highway, without legislative authority, whether incommoding public travel or not, is a nuisance punishable by indictment. (See cases cited on p. 22 appellant's brief.)

Hyde v. *Middlesex*, 2 Gray, 267.
Holbrook v. *McBride*, 4 Gray, 215, 220.
Gregory v. *Adams*, 14 Gray, 242, 246, 247.
Stoughton v. *Porter*, 13 Allen, 191.
Commonwealth v. *Blaisdell*, 107 Mass. 234.
Colburn v. *Kittredge*, 131 Mass. 470.
Allen v. *Boston*, 159 Mass. 324, 335.
Gifford v. *Westport*, 190 Mass. 323.
Com. v. *The Railroad*, 202 Mass. 394, 397.
Smith v. *Adams*, 206 Mass. 513, 514.

It is also the law in Massachusetts that it is the duty of a town to remove from a public street anything constituting a nuisance therein and that if the town fails to remove such nuisance it is liable to indictment.

Young v. *Yarmouth*, 9 Gray, 386, 389.
Com. v. *Boston*, 97 Mass. 555, 562.

The whole record makes it clear that for a considerable time, and especially since the refusal of the appellee's petitions of 1902 and 1905, the town has regarded the appellee's line as being within its streets without legislative authority, as consequently being unlawfully there, in fact constituting a nuisance, and this attitude is maintained before this Court. (Appellant's Brief, p. 7.)

If this was the belief of the town, it was its duty as a town under the laws of the Commonwealth to remove what it considered to be an unlawful structure in its streets, and since of course the town must act by its agents it would inevitably fall to the selectmen to exercise this town function and duty. The action of the selectmen in attempting to force the removal of the appellee's lines can be attributed to nothing else than to an attempt to fulfil this important town function. It would be unreasonable to regard them as having acted as individuals, for as individuals they would have no right to remove the appellee's lines unless they were individually inconvenienced in the use of the streets, which was not in fact the case, as it appears that there was no interference by the appellee's line with the ordinary travel upon the streets. Nor can they be treated as having acted as the special board created by the above-mentioned statutes, since as already shown they were in that capacity entirely without jurisdiction to act in the matter at all.

Clearly it cannot be necessary for the officers of a town before proceeding to remove an obstruction placed in its

streets to wait for a vote at town meeting authorizing such procedure as the appellant seems to contend. (Appellant's Brief, p. 36.) A telegraph line is no different in this respect from any other obstruction. To hold that the selectmen of a town before removing a telegraph line which they regarded as unlawfully in the streets must be armed with a prior vote of the inhabitants of the town at town meeting would involve the proposition that if a tent were erected over night in the middle of a highway the officers of the town could not remove it until a town meeting had been held and a vote to that effect passed.

It was not only the right but the duty of the selectmen if they believed that the appellee's line was unlawfully in the streets of the town to deal with it forthwith as they would with any other obstruction in the streets and it was not necessary for them to wait for any town vote upon the subject.

Nor is there any merit in the appellant's suggestions (Brief, p. 36) that the selectmen, acting in behalf of the town, would not be justified in resorting to any other method than a court proceeding to procure the removal of the appellee's line. The selectmen were justified in resorting to any method the law allowed to get rid of what they regarded as a nuisance in the streets, just as a private individual inconvenienced by an unlawful obstruction in a highway may abate it.

Brown v. *Perkins*, 12 Gray, 89, 101.

So a town by its officers may remove such an obstruction out of hand indeed, it is the town's duty so to do.

In *Young* v. *Yarmouth*, 9 Gray, 386,

an action to recover of a town for injuries caused by a telegraph post in a street, the court held that, apart from statute, if the post was an obstruction rendering the street

unsafe, it would be a defect for which the town might be liable. "It would be so", the court said, at page 389, "because such erection of posts would have been an unauthorized act, and the duty of the town of Yarmouth would have been to require their immediate removal."

See also —

Com. v. *Boston*, 97 Mass. 555, 562.

What the selectmen, acting for the town, may lawfully do, they may lawfully intimate, or announce or threaten that they will do.

The appellee's suggestion, therefore, that the town is not the proper defendant because the selectmen were acting ultra vires (Brief, p. 56) cannot be supported.

The selectmen, it is assumed, in their capacity as town officers, in good faith believed the telegraph line was not lawfully in the town's streets, and that therefore it was the town's duty, and their duty as the appropriate town agents, to remove the line. It was against this expected action of the town, through its selectmen, that the appellee, believing its line was lawfully in the streets by virtue of the Act of Congress, sought relief.

The appellant's remark that "it will hardly be contended that virtuti officii they [the selectmen] had authority from the town to commit assault and battery" is entirely beside the point. As concerns the removal of the appellee's line, which it was the chief object of this bill to prevent, if the selectmen had undertaken to remove appellee's line, no agent of the appellee would have resisted. There would have been no danger of assault and battery. What the appellee sought to prevent was the physical removal of its line by the town acting through its selectmen. As regards relocating, resetting, or repairing, if, as the town thought, the appellee's line was unlawfully in the streets, it would have the right to prevent the appellee

from relocating, resetting, or repairing, by such physical means as might be necessary to accomplish its end.

It is submitted that if the selectmen had done what they appeared to be about to do, their acts would not have been ultra vires, but would have been the act of the town, and that this bill was properly brought against the town.

IV.

THE RECORD SHOWS THAT THERE WAS OCCASION FOR THE INTERPOSITION OF A COURT OF EQUITY.

It was made perfectly evident to the appellee when the question of the error of name in the application and the use of the term "location" was under discussion, that it would be useless to have the petition corrected, presumably because it would not be granted in any form. (Record, Ryan, pp. 37, 38, 39.)

In fact, Selectman Kimball in substance so testified. (Record, p. 43.) This witness further testified that it was stated by the selectmen at the conference in Pillsbury's office that the object of the town was to discover the right which any telegraph company had to use its streets, and if it had a right well and good, and if it did not have a right the town was not going to have any telegraph company there. (Record, pp. 43, 44.)

Ryan testified that at the conference in Pillsbury's office the town's counsel said that they did not propose to have any poles of the company in the town on any street if they could prevent it, and that Selectman Kimball said that there were no streets that they wanted the company to use in the Town of Essex. That the upshot of the conference was that the company could not set any poles in the Town of Essex unless the court said so. (Record, pp. 37, 38.) Pillsbury testified that at the same conference the town's counsel stated to him that the town

wanted the poles taken entirely out of the town, would not grant the company's petition, and would prevent construction work if necessary by force. (Record, pp. 30, 31.) Ryan testified that after June 30, 1905, and before July 11, 1905, he asked the chairman of the selectmen if he had any objection to the company's going ahead and repairing the line as it stood, replacing the poles with new poles, and the chairman said that if the company made an attempt to do any work in the town, the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested. (Record, p. 37.)

The defendant's answer admits that the town through its selectmen have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town and that the selectmen of said town forbade the plaintiff from resetting its poles, from changing the location of its poles, from restringing its wires, or from doing business of any sort in said town, on the highways of said town, until first a franchise was obtained therefor in accordance with the laws of Massachusetts. (Record, p. 10.) By its cross-bill the appellant prayed that the plaintiff be ordered to forthwith take up its poles from said streets and that the plaintiff be restrained from using said poles and wires for its business purposes until it shall have first obtained a franchise from the Board of Selectmen as provided by the laws of Massachusetts. (Record, p. 14.)

The statement of the answer that the selectmen forbade the appellee from resetting its poles, etc., until first a franchise was obtained therefor according to the State law, and the prayer of the cross-bill that the appellee be enjoined from using its lines until it had obtained a franchise from the selectmen, and the contention on page 51

of the appellant's brief that the evidence shows no intent finally to refuse the appellee's application for a location, but only until the appellee, by removing its line, put itself in a position to invoke the jurisdiction of the selectmen, with an implication that then the application might be granted, seems almost ironical, in view of the fact that the record shows that there was not the slightest possibility of the selectmen giving the appellee a location under any conditions. (Record, Ryan, pp. 37, 38, 39; Kimball, pp. 43, 44; Pillsbury, pp. 30, 31.)

The District Court correctly found the facts to be as stated in the above quoted evidence, namely, that the selectmen would under no circumstances give the appellee a location. (See that part of the court's opinion quoted on pages 85 and 86 of this brief.)

To require the appellee to take up its line and apply for a location to a hostile board which had evinced a determination never to grant such a location would plainly be to exclude the appellee altogether.

The contention of the appellant on pages 44, 45 of its brief that the declarations of the selectmen cannot be considered and the cases cited by the appellant in support of the contention are entirely beside the mark. If it be conceded, as for the purposes of this argument it must be conceded, that the appellee, under the Act of Congress, had a right to occupy the streets of the town with its line and to have the aid of a court of equity to prevent the removal of that line by the town, it was clearly the appellee's right in order to invoke and obtain the injunctive remedy to show that the town was hostile and that removal was threatened by it. This could only be shown by the acts and declarations of the town's officers. It makes no difference to the appellee whether those acts and declarations were matters of record or not. What the appellee was concerned to prevent was removal. What the appellee

had to show to prevent removal was that there was danger of removal. The acts and declarations of the selectmen showed the existence of this danger. This was the sole purpose of the introduction of the evidence of these declarations and acts, and for this purpose the evidence was clearly admissible.

The suggestion of the appellant on page 56 of its brief that the selectmen had in mind simply the institution of legal proceedings cannot be sustained. The selectmen did threaten to prevent the appellee by force from doing anything in the way of relocating, resetting, or repairing. (See particularly the evidence of Pillsbury and Ryan, quoted above, which evidence is not contradicted.)

While the threat of force was more specifically directed against relocating, resetting and repairs than towards compelling the removal of the line altogether, still the record reflects a temper and disposition on the part of the selectmen and the townspeople generally that makes it apparent that an attempt on the part of the town to remove the line was imminent. The whole atmosphere of the case is pregnant with a determination on the part of the town to bring matters to an issue and precipitate the controversy by an attempt to remove the appellee's line from the streets.

In any event the appellant, whether justified by State law or not, threatened action which would deprive the appellee of a right conferred on it by the Act of Congress and the appellee was, and is, therefore, entitled to equitable relief by injunction on the same principle by which a person whose rights are in danger of being violated by the enforcement of an unconstitutional statute is entitled to have the enforcement of such statute as against him enjoined.

Dobbins v. *Los Angeles*, 195 U. S. 223.

V.

THE FINAL DECREE IS NOT TOO BROAD AND SHOULD BE AFFIRMED.

The appellant contends that the final decree should be modified by adding to it the proviso set forth on page 57 of the appellant's brief.

This is the first time that any such suggestion has been put forward in behalf of the town. The decree (Record, p. 18) is, so far as the injunction contained in it goes, substantially identical with the temporary injunction granted on September 5, 1905. (Record, p. 7.)

No motion was ever made by the town to modify the temporary injunction; it was not suggested at the hearing in behalf of the town that the temporary injunction was too broad; and when the District Court determined that the telegraph company had a right to maintain its lines in the streets of the town the town offered no objection to making the temporary injunction permanent on the ground that it was too broad.

The final decree so far as the injunction embodied in it is concerned may be divided into two parts. The first part enjoins the defendant from interfering in any manner whatsoever with the complainant's line of telegraph in the defendant town. The second part enjoins the defendant from interfering in any manner whatsoever with the location or relocation by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the resetting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, relocation, resetting, repairs or changes by the

complainant. The first part of the relief was sought by the appellee to prevent the threatened removal of its lines from the streets of the town, and the second part of the relief was sought by the appellee to enable it to make the changes in the line necessary to make the line safe and efficient. These changes as the evidence shows involved the location or relocation, whichever the proper term may be, of certain of the poles, the resetting of some of the poles and other repairs and changes necessary to put the line in a condition of safety and efficiency.

The final decree is to be construed in the light of the circumstances existing at the time it was made, and language which might apart from such circumstances seem too broad should receive the limitation required by the conditions under which and the purposes for which the relief is sought.

It was not the intention of the appellee when framing its prayer for relief, nor of the court in entering the final decree, to deprive the State of Massachusetts, or the Town of Essex or the selectmen of the town, acting as an independent board, of the right to make any reasonable regulation covering the maintainence and operation of the appellee's telegraph line in the Town of Essex. Nor is such regulation in the appellee's opinion excluded by the final decree as it stands, if it be properly construed in the light of the attending circumstances.

As concerns Section 2 of chapter 509 of the Acts of 1911, which is the present substitute of chapter 237 of the Acts of 1903 and of the earlier statutes, the final decree does not interfere with the exercise of any duty or right of regulation on the part of the selectmen under that statute, for the reason that the final decree runs against the Town of Essex and not against the selectmen, acting as a distinct and independent board. It is not believed that the final decree would interfere with the making of regu-

lations by the selectmen under Section 54 of chapter 25 of the Revised Laws, or with the enforcement of such regulations under Section 55 of said chapter, or with any regulation or requirement that might be made under Sections 16 to 23, inclusive, of chapter 122 of the Revised Laws, or with the enforcement thereof under Sections 18 and 19 of said chapter, or with the right of the town to maintain a bill in equity to compel the removal of the appellee's line, should it become a nuisance, in order to avoid liability under Section 18 of chapter 51 of the Revised Laws.

The concluding portion of the final decree, "from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, resetting, repairs or changes by the complainant", does not enlarge the scope of what precedes it, as it is to be presumed that it relates only to such persons or corporations as are within the control of the defendant town.

If, however, it should be the opinion of this Court that the final decree as framed is too broad, the appellee submits that in case the final decree is amended by the addition of the clause suggested on page 57 of the appellant's brief that there should be inserted in the fifth line of said clause after the word "the" and before the word "laws", the words "reasonable and valid".

VI.

The appeal should therefore be dismissed with costs.

G. PHILIP WARDNER,
Counsel for Appellee.

TOWN OF ESSEX v. NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 56. Argued November 5, 1915.—Decided December 6, 1916.

The contention that an act of Congress as construed and applied by the District Court transcends the power of Congress, if of sufficient substance gives this court jurisdiction of a direct appeal under § 238, Judicial Code.

The Post Road Act of 1866 substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1.

A State has no authority to say that a telegraph company may operate lines constructed over postal routes within its borders. *West Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

A city may not arbitrarily exclude wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations. *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160.

Where a town has given written permission to a telegraph company specifying how posts could be placed and wires run, and the company has complied with such permission, such lines are protected by the Post Road Act of 1866 against subsequent exclusion or other arbitrary action by the town.

A municipality may, under exceptional circumstances, be held to have waived its rights, or to have estopped itself to assert them as by acquiescing for a long period in the maintenance of the system and large expenditures of money in connection therewith by a telegraph company.

The Post Road Act of 1866 must be construed and applied in recognition of the existing conditions and with a view to effectuate the purposes for which it was enacted.

Where rights of a telegraph company under the Post Road Act would be violated by threatened arbitrary action by a municipality, they may be protected by injunction; but the injunction should not prevent the municipality from subjecting the location and operation of the company's lines to reasonable regulations.

THE facts, which involve the rights of telegraph companies under, and the construction of, the Post Road Act of 1866, are stated in the opinion.

Mr. William G. Thompson, Mr. George E. Mears and *Mr. Romney Spring* for appellant, submitted:

On the date of the filing of the petition of June 1, 1905, this plaintiff was occupying the streets of the Town of Essex without any right whatever, either under the laws of the Commonwealth or of the United States.

The plaintiff had acquired no right to occupy said streets by complying with the statutes of the Commonwealth of Massachusetts.

The plaintiff had acquired no right to occupy said streets by lapse of time or by the acquiescence of any officials.

The plaintiff had acquired no right to occupy said streets under the act of Congress of July 24, 1866.

The selectmen's denial of the petition of June 1, 1905, did not impair any Federal right of the plaintiff under the act of Congress of July 24, 1866.

The only action of the selectmen that could have impaired the plaintiff's rights is a formal vote evidenced solely by the record required by the statute.

These propositions being sound, the denial by the selectmen of the petition of June 1, 1905, could not possibly impair any right of the plaintiff, for that petition was not the plaintiff's petition.

Even if the petition of June 1, 1905, is regarded as the petition of this plaintiff, then under the statute from which the selectmen derived their powers to act, they had no jurisdiction to grant it.

If the selectmen's denial of the petition (assumed for the purposes of argument to be the petition of the plaintiff) was required by a state statute, which was reasonable on any view of the meaning of the act of July 24, 1866,

then that denial could not possibly impair any right of the plaintiff under the act of Congress.

Even if the action of the selectmen may be ascertained from declarations and explanations outside their record, still no impairment of any Federal right of the plaintiff is shown.

The threats of the selectmen furnish the company no ground whatever for equitable relief in a Federal court, either against the town, or against the selectmen themselves.

The plaintiff, an open and persistent violator of the law, cannot invoke the assistance of a court of equity.

Even if the language of the selectmen most favorable to the plaintiff be adopted, the District Court had no right to make this a ground for an injunction, either against the town or against the selectmen.

Even if the preceding three main propositions were all unsound, the final decree should be modified.

The terms of the injunction, if granted, would deprive the Commonwealth of Massachusetts of all power in the future to impose any regulations at all upon the lines of the plaintiff.

Even if such an injunction were not a violation of the eleventh amendment to the Constitution, it is far in excess of anything necessary to protect the rights of the plaintiff under the act of Congress of July 24, 1866.

The injunction plainly and unwarrantably deprives the town of a remedy conferred upon it by the laws of the Commonwealth, viz.: R. L., c. 25, § 54.

The decree also nullifies the provisions of R. L., c. 122, §§ 16–23.

The decree also unwarrantably hampers the town in protecting itself by proceedings in the state courts under R. L., c. 51, § 18.

The limitation of the decree by the language suggested is the least that is required to render the decree valid on

any theory of the scope of the act of Congress of July 24, 1866.

Numerous authorities are cited in support of these contentions of appellants.

Mr. G. Philip Wardner for appellee.

Mr. Justice McReynolds delivered the opinion of the court.

Appellant was enjoined by the decree below from interfering with the operation of lines owned by the appellee company. The controversy arose under the act of Congress approved July 24, 1866 (14 Stat. 221, c. 230, Rev. Stat., § 5263, *et seq.*), which declares that companies accepting its provisions "shall have the right to construct, maintain, and operate lines of telegraph . . . over and along any of the military or post roads of the United States," provided they do not interfere with ordinary travel. Appellant insists that, as construed and applied below, the statute transcends the powers granted to Congress by the Constitution; and there is sufficient substance in the claim to give us jurisdiction.

The appellee was incorporated under the laws of Massachusetts, April 7, 1884. Immediately thereafter it filed with the Postmaster General a written acceptance of the restrictions and obligations prescribed by the act of July 24, 1866, and constructed lines of wires strung upon poles across the Commonwealth of Massachusetts and particularly along certain streets and roads in the Town of Essex. These have been continuously operated in connection, on the east, with cables reaching foreign countries, and, on the west, with wires leading to all parts of the Union; for a long time they have constituted an important part of the Postal Telegraph and Cable system; and over them pass great numbers of interstate and foreign

messages, many being transmitted for the United States under official regulations.

The especially pertinent provisions of the Massachusetts laws relating to companies incorporated for transmitting intelligence by electricity, in force during 1884 and long thereafter, appear in Public Statutes, chapter 109, §§ 2, 3, 15, and chapter 27, § 49, and are as follows:

"Each company may under the provisions of the following section construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the Commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters."

"The Mayor and Aldermen or Selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts and the height at which, and the places where, the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

"No enjoyment by a person or corporation for any length of time of the privileges of having or maintaining telegraph posts, wires or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easements or raise any presumption of a grant thereof."

"The Selectmen of the town may empower citizens of Massachusetts to establish and maintain in such town posts, wires and other apparatus for telegraphic and tele-

phonic communication in conformity with the provisions of Chapter 109."

In *Pierce* v. *Drew*, 136 Massachusetts, 75, 76–77 (1883), the Supreme Court said of chapter 109:

"That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws, for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads upon the locations assigned to them by the officers of the municipality wherein such ways are situate, cannot be doubted. . . .

"No right is given these companies to use the highways at their own pleasure, or to compel in all cases, as the plaintiff suggests, locations therein to be given them by the municipal authorities. The second section of the statute is to be construed with the third section, and shows an intention that a legally constituted board shall determine not only where, but whether, there can be a location which shall not incommode the ordinary public ways, with full power to revise its own doings, and to correct any errors which the practical working of the arrangement may reveal."

The evidence warrants the conclusion that in 1884 appellee made written application to the Essex Selectmen for a right of way, but their records disclose nothing concerning the matter. Directly thereafter, without opposition, the existing lines were constructed along four miles of the town's highways. During many succeeding years no objection appears to have been made to their operation, and, until a short time before this suit was begun, their presence was acquiesced in. Certainly no sort of affirmative action was taken to interfere with them; and there is evidence indicating that half the poles were relocated under direction of a selectman, about 1895, when the electric railway was laid down.

In 1902, repairs being needed, the selectmen were peti-

tioned to locate the poles and license their future maintenance. This request was not granted. In 1905, repairs having become imperative, another petition for a location was presented. This was refused; officers of the town then denied appellee's right to use the highways, and threatened to prevent repairs, by force if necessary, and to take action against future operation of the lines within its limits. Thereupon, July 31, 1905 (twenty-one years after original construction), the telegraph company, relying on the act of 1866, commenced this proceeding in the District Court, seeking an injunction against threatened interference. By a temporary order granted September 5, 1905, the town, its officers, agents and employés, were "enjoined and restrained, until the further order of this court, from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the re-setting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant."

Answering, September 26, 1905, appellant claimed the lines were constructed without any authority whatsoever and denied the company's right, under the act of 1866 or otherwise, to maintain or operate them. A cross bill was also presented, alleging unlawful use of the ways and praying that the company be restrained therefrom until a franchise shall be obtained as provided by state laws.

No motion was ever made to dissolve the temporary injunction. The cause coming on for final hearing upon pleadings and proofs in 1913 (twenty-nine years subse-

quent to construction), the court held that the act of 1866 protected the lines from interference, and rendered a decree dismissing the cross bill, sustaining the original bill, and awarding a perpetual injunction substantially in the language of the preliminary order dated September 5, 1905.

Appellant now maintains that the court below erroneously construed and applied the act of 1866 and undertook to bestow upon the telegraph company rights in its highways beyond the power of Congress to grant; that its ways are occupied without lawful authority, either state or Federal; that such occupation constitutes a continuing nuisance; and that the original bill should have been dismissed, leaving the town free to act as seemed advisable.

Many opinions of this court establish beyond question the validity and point out the general purposes of the act of 1866. "It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed." *Pensacola Telegraph Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1, 11. A State has no authority to say that a telegraph company may not operate lines constructed over postal routes within its borders. *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 554. A City may not arbitrarily exclude the wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations. *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92, 105; *West. Un. Tel. Co.* v. *Richmond*, 224 U. S. 160, 170. See also *West. Un. Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540; *United States* v. *Union Pacific Ry.*, 160 U. S. 1, 44; *Postal Tel. Co.* v. *Chicopee*, 207 Massachusetts, 341, 343.

If the official records of the selectmen disclosed that,

responding to the petition of 1884, they gave a writing "specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run," and if thereafter the telegraph company had placed poles and strung wires accordingly, plainly, we think, under the opinions cited above, such lines would be protected by the act of 1866 against exclusion or other arbitrary action by the town.

With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment (*Roberts* v. *Northern Pacific R. R. Co.*, 158 U. S. 1, 11; *Northern Pacific R. R. Co.* v. *Smith*, 171 U. S. 260, 271, 275); and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. *Randolph County* v. *Post*, 93 U. S. 502, 513; *Boone County* v. *Burlington &c. R. R.*, 139 U. S. 684, 693; *City Railway* v. *Citizens' Railroad*, 166 U. S. 557, 566; *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 662; Dillon, Municipal Corporations, 5th ed., §§ 1194, 1227.

The streets and highways of Essex are undoubtedly post roads within the meaning of the act of 1866. *West. Un. Tel. Co.* v. *Richmond*, *supra*; act of March 1, 1884, c. 9, 23 Stat. 3. What rights—if any—in respect of them

were immediately secured by the telegraph company through acceptance of that act, we need not consider. It entered upon those now occupied notoriously, peacefully and without objection, and has developed there a necessary means of communication. The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted. Among the latter, as stated in *Pensacola Tel. Co.* v. *West. Un. Tel. Co.* and *West. Un. Tel. Co.* v. *Massachusetts, supra,* are the extension and protection of instrumentalities essential to commercial intercourse and the efficient conduct of governmental affairs. In the circumstances, appellee has acquired the same Federal right to maintain and operate its poles and wires along the ways in question that would have attached had the selectmen granted a formal antecedent permit. Commercial transactions and the orderly conduct of governmental business have come to depend on the daily use of these lines and certainly would be as seriously hindered by their severance as if they had been constructed after an official location. There is no suggestion that ordinary travel is being interfered with; and, having long acquiesced in appellee's peaceful possession, the town may not now rely upon the claim that this was obtained without compliance with prescribed regulations and treat the company as a naked trespasser. Its rights under the Federal law would be violated by the threatened arbitrary interference.

The further claim is here made for the first time that, in any event, the injunction is too broad. In *West. Un. Tel. Co.* v. *Richmond, supra,* it was pointed out that the act of 1866 does not deprive a municipality of the right to subject telegraph companies occupying its streets to reasonable regulations. The injunction as granted might interfere with action altogether proper and the decree below will be modified by the addition of the words,

"Provided, that nothing herein shall be so construed as to prevent the Board of Selectmen or the Town of Essex from subjecting the location and operation of the company's lines to reasonable regulations." With this modification, it is affirmed. The costs will be charged to appellant.

Modified and affirmed.